Supreme Court, U.S.
FILED

(1)

031103 DEC 4 2003

No.

OFFICE OF THE CLERK

In The

Supreme Court of the United States

GLENDA GAIL CROOK, U.S. citizen

Veteran and Pro se Petitioner

v.

DEPARTMENT OF DEFENSE

Respondent

On Petition For Writ Of Certiorari
To The Federal Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

GLENDA GAIL CROOK
(aka GLENDA GAIL PARKER)
Petitioner
5902 Mt. Eagle Drive, # 307
Alexandria, VA 22303
(703) 960-5602

A. QUESTIONS PRESENTED FOR REVIEW:

1. Does the Fifth Amendment guarantee a civil servant U.S. citizen the right to discovery, when filed and served, in Due Process of Law in an employment termination action by the U.S. Department of Defense?

2. Does the Fifth Amendment protect a civil servant U.S. citizen's property, goodwill, and liberty of contract interest in a TS/SCI security clearance held for 16 years?

3. Does Article II require the Executive Branch to comply with the Civil Rights Act of 1964, The Privacy Rights Act of 1974, the Health Insurance Portability and Accountability Act (HIPAA), with 28 U.S.C. § 3486(e), and the Whistleblower Protection Act in matters of administrative investigations involving termination of employment?

4. Does signing "Petitioner's Fed. Cir. R. 15(c) Statement Concerning Discrimination" and checking item (4), "The case involves an application to the Office of Personnel Management for benefits." require a petitioner to de facto give up her Constitutionally protected civil rights in order to appeal in the Federal Court of Appeals?

5. The Department of Defense did not publish or have a hearing on a regulation under 28 U.S.C. §§ 3901, 3902, and 3903 to prevent the unauthorized use of health information in an administrative investigation/hearing or permitting the publication of medical information to a Merit Systems Protection Board.

6. May a Government employer release confidential health or falsified health information to a Merit System Protection

Board or other administrative hearing without the permission of the person identified in the confidential health information in violation of Title II (HIPAA) amending 28 U.S.C. § 3486(e)?

7. Does Article II of the U.S. Constitution require the Department of Defense to re-employ the petitioner upon her return to duty from military service in accordance with 38 U.S.C. Chapter 43?

B. PARTIES TO THE PROCEEDINGS - None else

TABLE OF CONTENTS

A. QUESTIONS PRESENTED i
B. PARTIES TO THE PROCEEDINGS ii
C. TABLE OF CITED AUTHORITIES v
  1. CONSTITUTIONAL AUTHORITY v
  2. STATUTORY AUTHORITY v
  3. REGULATORY AUTHORITY vi
D. CORPORATE DISCLOSURE STATEMENT 1
E. OPINIONS AND ORDERS ENTERED 1
F. JURISDICTION 3
  1. DATE OF ORDER TO BE REVIEWED 3
  2. RULE 11 STATEMENT 3
  3. N/A – NO CROSS-PETITION FILED 4
  4. STATUTE CONFERING JURISDICTION 4
  5. RULE 29.4 NOTIFICATION 4
G. AUTHORITIES INVOLVED IN THIS CASE 4
  1. CONSTITUTIONAL PROVISIONS 4
  2. STATUTES INVOLVED 5
  3. REGULATIONS INVOLVED 5
H. FACTS MATERIAL TO CONSIDERATION 6
  1. STATEMENT OF FACTS 6
  2. JURISDICTION OF FIRST COURT 8
I. RULE 10(c) STATEMENT 8
J. CONCLUSION 9

APPENDIX

I. OPINIONS, ORDERS, FINDINGS OF FACT, CONCLUSION OF LAW, AND TRANSCRIPTS 1 – 24

II. OTHER RELEVANT OPINIONS 25 – 32

III. ORDER ON REHEARING 33

IV. JUDGEMENT TO BE REVIEWED 34 – 37

V. COPY OF AUTHORITIES 38 – 276

VI. OTHER MATERIAL ESSENTIAL TO UNDERSTAND THE PETITION 277 - 283

C. TABLE OF CITED AUTHORITIES

1. CONSTITUTIONAL AUTHORITY

AUTHORITY	RELEVANCE
Fifth Amendment to the U.S. Constitution (App. V, pg 41)	Protects a U.S. Citizen's property interests and due process rights
Article II to the U.S. Constitution (App. V, pg 38)	Requires the Department of Defense to abide by laws
Section 8 of the U.S. Constitution (App. V, pgs 39 – 40)	Relegates the authority to make and approve arms sales to the U.S. Congress

2. STATUTORY AUTHORITY

AUTHORITY	RELEVANCE
28 U.S.C. §§ 1253 3904 (App. V, pgs 101 & 111)	Establishes jurisdiction
Fifth Amendment to the U.S. Constitution (App. V, pg 41)	Establishes jurisdiction
Title 5, § 7703 (App. V, pgs 90 – 91)	Establishes jurisdiction
38 U.S.C. § 4324 (App. V, pgs 147 – 149)	Establishes jurisdiction
The Westfall Act 28 U.S.C. §§ 1346(g) and 2679(d) (App. V, pgs 104 & 107 – 110)	Permits civil action/Constitutional torts against government employees who act outside of their duties.
5 U.S.C. §§ 552(b) and 552(g)(1)(D) (App. V, pgs 50 & 58-59)	Establishes jurisdiction and prohibits release of plaintiff's grievance record outside of the grievance channels without her written permission.

AUTHORITY	RELEVANCE
The Health Insurance Portability and Accountability Act (HIPAA) SECs 248(e) & 262(a)(6) (App. V, pgs 209 & 214)	Prohibits the exploitation of an individual's medical records by the DOD in an administrative investigation [to revoke a security clearance or terminate a civil servant].
18 U.S.C. §§ 24 and 1025, as amended by HIPAA (App. V, pgs 92 – 93)	Prohibits defendant(s) from making false statements relating to the health of the plaintiff that could result in defrauding the government of health care benefits.
18 U.S.C. § 3486(e), as amended by HIPAA (App. V, pgs 99 - 100)	Prevent the defendant(s) from using health information in any administrative investigation directed against the plaintiff.
38 U.S.C. § 4314, 4322, 4323, 4324, 5425 (App. V, pgs 130 – 132, 142 - 150)	Requires the DOD to reemploy the petitioner/plaintiff.
VA Code §§ 18.2-499 and 18.2-500	Codifies defendants and plaintiff's fiduciary duty

3. REGULATORY AUTHORITY

AUTHORITY	RELEVANCE
DODI 1205.12, April 4, 1996 (App. V, pgs 243 -270)	Regulatory requirement to re-employ plaintiff upon return from military service even if no longer qualified for previously held position.
DODD 5200.2-R, paragraphs 3-102, 1-322, and 3-101. (App. V, pgs 271 – 276)	De facto proof that no clearance was required for the plaintiff's position.

AUTHORITY	RELEVANCE
DODD 7050.6, paragraphs 4.1 and 4.4 (by reference)	DOD Directive protecting whistleblowers from termination.

D. CORPORATE DISCLOSURE STATEMENT: Not Applicable (N/A)

E. CITATIONS OF OPINIONS AND ORDERS ENTERED IN THE CASE

1. Per Curiam Decision July 14, 2003, opinion not citable as precedent (App. I, pgs 1 - 9)

a. 5 U.S.C. § 7703(c) (2000), pg 2

b. 5 U.S.C. § 7701(c)(1)(B) (2000), pg 2

c. *Hesse v. Dept of State*, 217 F.3d, 1377-80 (Fed. Cir. 2000), pg 3 & 4

d. Id at 1381, 1382 (citing *Jones v. Dept of the Navy*, 978 F.2d 1223, 1225-26 (Fed. Cir. 1992), pg 3

e. *Spears v. Merit Systems Protection Board*, 766 F.2d 520, 522 (Fed. Cir. 1985), pg 4

2. MSPB Decision, January 17, 2002 (App. I, pgs 17 - 24)

a. 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d), pg 17

b. 5 C.F. R. § 1201.58, pg 17 footnote

c. 5 U.S.C. Chapter 75, pg 21

d. DOD 5200.2-R paragraph C3.1.2, pg 20

e. 5 C.F.R. § 1201.112(a)(5), pg 5

f. *Germino v. Department of Defense*, 61 M.S.P.R. 686-87 (1994), pg 20

g. *Hesse v. Department of State*, 82 M.S.P.R. 489, 492, 493 (1999), citing *Hinton v. Department of the Navy*, 61 M.S.P.R. 692, 697 (1994), pg 21

h. *Holley v. Department of the Navy*, 62 M.S.P.R. 300, 303-04 (1994), citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495, 84 L.Ed.2d 494 (1985), pg 19

BEST AVAILABLE COPY

i. *Jones v. Department of the Navy*, 48 M.S.P.R. 680, 689 (1991), aff'd,' 978 F.2d 1223 (Fed. Cir. 1992), pg 18

j. Id at 690 (citing, *Department of the Navy v. Egan*, 484 U.S. 518, 527-32, 108 S.Ct. 818, 824-26, 98 L.Ed.2d 918 (1998), pg 19

k. *Kriner v. Department of the Navy*, 61 M.S.P.R. 526 (1994), pg 19

l. *Matos v. Department of the Navy*, 62 M.S.P.R. 117, 119 (1994), pg 19

m. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991), pg 19

n. *Vanduzer v. Department of the Navy*, 41 M.S.P.R. 357, 361-62 (1989), pg 21

o. *West v. Department of the Navy*, 63 M.S.P.R. 86, 88-89 (1994), pg 20

3. Motion for Rehearing DENIED September 10, 2003 (App. III, pg 33)

a. No additional cites provided.

4. U.S. District Court for the Eastern District of Virginia Amended Memorandum Opinion on Civil Action No. 03-431-A, dated October 27, 2003 (App. II, pgs 25 – 32)

a. Rule 12(b)(6) of the Federal Rules of Civil Procedure, pg 25, 29 & 31

b. Federal Circuit Rule 15(c), pg 3, 5, 6 & 8

c. Federal Rule of Civil Procedure 58. Fed. R. Civ. P. 58, pg 32

d. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), pg 27

e. *Crook v. Department of Defense*, 71 Fed. Appx. 54, 2003 WL 21675126, at *1 (Fed. Cir. July 14, 2003), pg 27 footnote

f. *Daniels v. United States Postal Service*, 726 F.2d 723, 724 (Fed. Cir. 1984), pg 30

g. *Davidson v. United States Postal Service*, 24 F.3d 223, 223-224 (Fed. Cir. 1994), pg 30

h. *Mylan Lab., Inc. v. Matkari*, 7F.3d 1130, 1134 (4th Cir. 1993), pg 27

i. *Smith v. Horner*, 846 F.2d 1521, 1522, 1523, 1524 (D.C. Cir. 1988), pg 30 & 31

j. *Williams v. Department of the Army*, 715 F.2d 1485 (Fed. Cir. 1983), pg 30

F. JURISDICTION – 28 U.S.C. §§ 1253, 1346(g), 2679(d), 3901, 3902, 3903, 3904, 3905, and the Fifth Amendment to the U.S. Constitution protecting property interests and due process rights.

1. DATE OF ORDER TO BE REVIEWED:

a. Per Curiam Federal Circuit Court's July 14, 2003 decision, re-hearing motion denied September 10, 2003.

b. United States District Court Amended Memorandum Opinion dated October 27, 2003, on Civil Action Case No. 03-431-A[2]

2. RULE 11 STATEMENT: It is appropriate for the U.S. Supreme Court to decide this federal-question case under 28 U.S.C. Section 3904. The nature of this case is of such public importance that it justifies deviation from normal appellate practice. Virginia state code codified civil servant's fiduciary duty. Opinion entered by the Federal Circuit Court on July 14, 2003 and by the U.S. District Court on October

---

[2] See 28 U.S.C. § 2101(e).

27, 2003 contradicts numerous rulings on the Fifth Amendment. U.S. Supreme Court decision in *Hesse vs the Department of State*, 1998 prevents the MSPB from making security clearance determinations as it did in this case. Allowing the termination of a U.S. citizen's civil service employment without cause destroys the merit promotion system and opens the door to unfettered retribution for whistleblowing, to discrimination, and to political purging of the Executive Department and its contractors –all without judicial review.

3. NOT APPLICABLE – NO CROSS-PETITION FILED

4. STATUTE CONFERING JURISDICTION: 28 U.S.C. §§ 1253 and 3904; Fifth Amendment to the U.S. Constitution; 5 U.S.C. § 7703(b)(1); and 28 U.S.C. § 2101(e).

5. RULE 29.4 NOTIFICATION STATEMENT: Notification is required to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001. Certificate of service provided.

G. AUTHORITIES INVOLVED IN THIS CASE:

1. CONSTITUTIONAL PROVISIONS INVOLVED:

a. Fifth Amendment, which extends protection against arbitrary state legislation, affecting life, liberty and property and due process of law protection to U.S. citizens.

b. Article II of the Constitution which makes it incumbent upon the Executive Branch to take care to faithfully execute the laws.

2. STATUTES INVOLVED:

a. 3 U.S.C. §§ 401, 402, 451 and 453

b. 5 U.S.C. § 552a (The Privacy Rights Act of 1974)

c. 5 U.S.C. § 1221 (Individual Right of Action in Certain Reprisal Cases)

d. 5 U.S.C. § 2302(b)(10) & (11) (Prohibited Personnel Actions)

e. 5 U.S.C. § 7703(b)(1)

f. 18 U.S.C. §§ 24, 1035, 3231 and 3486(e)

g. 28 U.S.C. § 1253 (Jurisdiction)

h. 28 U.S.C. § 1346(g)

i. 28 U.S.C. § 2101(e)

j. 28 U.S.C. §§ 2674 and 2679

k. 28 U.S.C. §§ 3904 and 3905

l. 38 U.S.C. Chapter 43

m. H.R. 169 Notification & Federal Employee Antidiscrimination and Retaliation Act of 2002

n. Health Insurance Portability and Accountability Act of 1996

o. Taft-Hartley Act (Section 305)

p. Title 5 C.F.R., Chapter II, Subchapter A, Part 1208.16, and 5 C.F.R. §§ 1201.73 & 1207.73(c)

q. The Whistleblower Protection Act, as amended by the MSPB and OSC FY 2003 Authorizations Act

r. Title VII of the Civil Rights Act of 1964

3. REGULATIONS INVOLVED:

a. DODI 1205.12, April 16, 1997, "Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services."

b. DODD 5200.1-R, paragraphs 3-102, 1-322, and 3-101.

c. DODD 7050.6, paragraphs 4.1 and 4.4

H. FACTS MATERIAL TO CONSIDERATION On action arising from the United States Court of Appeals for the Federal Circuit and arising from the United States District Court for the Eastern District of Virginia, this petitions the Court for Writ of Certiorari under Rules 11 and 10(c) of the *Rules of the Supreme Court of the United States,* adopted January 27, 2003.

In accordance with William K. Suter's December 10, 2003 letter, this corrects, amends and re-submits for docketing in the correct format the petition and appendix filed December 4, 2003 and received by the Office of the Clerk of the Supreme Court, U.S., on Dec 5, 2003 and incorporates amendment filed December 8, 2003 and other typographical corrections.

1. STATEMENT OF FACTS:

a. On March 28, 2001, with only two days notice the DOD suspended the plaintiff indefinitely upon her return from military service alleging failure to maintain her security clearance.

b. Plaintiff, a civilian and a U.S. citizen employed with the DOD for 34 years, filed an instant appeal, alleging retaliation for protected disclosures and violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

c. DOD advertised two vacancies not requiring a security clearance and the plaintiff applied for both positions.

d. On August 2, 2001, the DOD revoked the plaintiff's security clearance.

1. STATEMENT OF FACTS Cont'd:

e. On August 28, 2001, the DOD notified plaintiff that her employment would be terminated effective September 25, 2001.

f. The plaintiff requested and was granted a discontinued service retirement effective the date of her request September 15, 2001.

g. The MSPB concluded that a clearance was required for the plaintiff's position and on January 17, 2002 affirmed the DOD's indefinite suspension action without fully responsive discovery by the DOD.

h. On December 19, 2002, the MSPB denied the plaintiff materially relevant discovery and issued a final order affirming DOD's termination action.

i. The plaintiff complied with all military service notification requirements of 38 U.S.C. Chapter 43.

j. Between June 18, 1999 and November 2001 the plaintiff made protected disclosures containing irrefragable proof and legal cites of statutes violated by DOD to the following offices: the DOD Inspector General, the Air Force Office of Special Investigations, to the Office of Special Counsel, to the Merit Systems Protection Board, to the Government Accountability Project, to the U.S. Congress (November 16, 1999 and subsequent dates), to the GAO and to the FBI.

k. In pursuing redress through the Federal Circuit Court, the petitioner did not consent to waive her Constitutionally guaranteed rights. Written guidance for pro se claimants provided by the MSPB was ambiguous. Clarifying pro se guidance received from the Federal Circuit Court Clerk's office was that the Federal Circuit Court could only address the issue

1. STATEMENT OF FACTS Cont'd:

ruled upon by the MSPB and that the plaintiff should file her discrimination claims with the District Court.

2. JURISDICTION OF COURT OF FIRST INSTANCE:

a. 5 U.S.C. § 7703(b)(1)

b. 38 U.S.C. §§ 4324, 4301- 4333

c. Title 5 C.F.R., Chapter II, Subchapter A, Part 1208.16, and 5 C.F.R. §§ 1201.73 & 1207.73(c)

I. RULE 10(c) STATEMENT: It is appropriate for the U.S. Supreme Court to decide this federal-question case. The Federal Circuit Appeals Court Opinion dated July 14, 2003 misapplied the *Hesse v. Department of State* (1998) decision of this Court in a way that conflicts with the Fifth Amendment to the U.S. Constitution. This case is of such public importance in ensuring the execution of civil servant's fiduciary duty[3] and in preserving the public's trust in the government that a deviation from normal appellate practice is justified.

Expedited review is requested under 28 U.S.C. § 3904. Allowing U.S. citizens' civil service employment to be terminated without cause and without limitation destroys the merit promotion system and opens the door to unfettered retribution for whistleblowing, to discrimination, to violations of privacy and to political purging of the Executive Department and its contractors –all without judicial review.

---

[3] Virginia Code §§ 18.2-499 and 18.2-500 makes a breach of fiduciary duty a litigatible cause of action under Virginia law.

J. CONCLUSION: WHEREFORE, the petitioner requests that a writ of certiorari be granted.

Respectfully submitted,

Glenda Gail Parker

GLENDA GAIL PARKER, U.S. Citizen, pro se
5902 Mt. Eagle Dr. # 307
Alexandria, VA 22303
703-960-5602

Of Counsel:
O. William (Bill) Davis, Attorney at Law
2145 Eagle Blvd
Kingston, Oklahoma 73439
580-564-3876/4732

APPENDIX

I. OPINIONS, ORDERS, FINDINGS OF FACT, CONCLUSION OF LAW, AND TRANSCRIPTS 1 – 24

II. OTHER RELEVANT OPINIONS 25 – 32

IV. ORDER ON REHEARING 33

IV. JUDGEMENT TO BE REVIEWED 34 – 37

V. COPY OF AUTHORITIES 38 – 276

VI. OTHER MATERIAL ESSENTIAL TO UNDERSTAND THE PETITION 277 - 283

Table of Contents
for
Appendix

Location	**Date**	**Document Description**
Appendix I App. 1 - 9	July 14, 2003	Fed. Circuit. Court PER CURIAM Decision, 03-3152
Appendix I App. – 10 - 11	Dec 19, 2002	Transcript of MSPB Hearing
Appendix I App.-12 - 16	Dec 19, 2002	Merit Systems Protection Board Final Order DC-0752-02-0053-I-1
Appendix I App. – 17 - 24	Jan 17, 2002	Merit Systems Protection Board Final Order DC-0752-02-0053-I-1
Appendix II App. - 25 -32	Oct 27, 2003	Fed District Court Opinion, Civil Action No. 03-431-A
Appendix III App. – 33	Sep 10, 2003	Fed Circuit Court Order DENIED a rehearing.
Appendix IV App. – 34 - 35	July 14, 2003	Fed Circuit Court Judgment, 03-3152
Appendix IV App. – 36 - 37	Oct 27, 2003	District Court Judgment and Amended Judgment

Location	**Date**	**Document Description**
		Civil Action No. 04-431-A
Appendix V App. – 38	Undated	Article II, U.S. Constitution
Appendix V App. – 39 - 40	Undated	Section 8, U.S. Constitution
Appendix V App. 41	Undated	Bill of Rights, U.S. Constitution
Appendix V App. -42 - 45	Undated	3 U.S.C. §§ 401, 402, 451, 453
Appendix V App. – 46 - 76	Undated	5 U.S.C. § 552a
Appendix V App. – 77 - 81	Undated	5 U.S.C. § 1221
Appendix V App. – 82 - 89	Undated	5 U.S.C. § 2303(b)(10), (11)& (12) & (e)
Appendix V App. – 90 - 91	Undated	5 U.S.C. § 7703
Appendix V App.–92 - 100	Undated	18 U.S.C. §§ 24, 1035, 3231, 3486
Appendix V App.-101	Undated	28 U.S.C. § 1253

Location	**Date**	**Document Description**
Appendix V App.-102-104	Undated	28 U.S.C. § 1346(a) -(g)
Appendix V App. - 105	Undated	28 U.S.C. § 2101(e)
Appendix V App.-106	Undated	28 U.S.C. § 2674
Appendix V App.-107-110	Undated	28 U.S.C. § 2679
Appendix V App.-111	Undated	28 U.S.C. § 3904
Appendix V App.-112	Undated	28 U.S.C. § 3905
Appendix V App.113-153	Undated	38 U.S.C. Chapter 43
Appendix V App.154-165	Undated	H.R. 169 Notification & Federal Employee Antidiscrimination and Retaliation Act of 2002
Appendix V App.166-234	Undated	Health Insurance Portability and Accountability Act of 1996

Location	**Date**	**Document Description**
Appendix V App.235-242	Undated	Taft-Hartley Act (Section 305)
Appendix V App.243-270	Apr 4, 1996, as changed Apr 16, 1997	DODI 1205.12 Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services
Appendix V App.271-276	January 1987	DODD 5200.2-R, Chapters 1, 3, 7, and 10
Appendix V App.277	Dec 7, 1995	Excerpt from Petitioner's Position Description
Appendix VI App.278-279	Mar 21, 2003	Fed. Cir. 15(c) Statement Concerning Discrimination filed with petitioner's Fed. Cir. Court Appeal of MSPB decision.
Appendix VI App.-280	Apr 20, 2003	Petitioner's Response – includes notification to Federal Circuit that a civil action lawsuit was filed in District Court, Number CA-03-431-A

Location	**Date**	**Document Description**
Appendix VI App.-281	Nov14, 2003	White House Memorandum supporting USERRA
Appendix VI App.-282	Jan 6, 2004	Employment ad published in *The Washington Post* help wanted ad section.
Appendix VI App.-283	Jan 6, 2004	Employment ad published in *The Washington Post* help wanted ad section.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record that will appear in Tables published periodically.

United States Court of Appeals for the Federal Circuit

03-3152

GLENDA G. CROOK (now known as Glenda Gail Parker),
Petitioner,
(Rec'd by Petitioner July 21, 2003)
v.

DEPARTMENT OF DEFENSE,
Respondent.

DECIDED: July 14, 2003

Before NEWMAN, MICHEL and RADER, Circuit Judges.

PER CURIAM.

Glenda Gail Parker (formerly Glenda Gail Crook) petitions for judicial review of the final decision of the Merit Systems Protection Board ("Board") dated December 19, 2002, Docket No. DC-0752-02-0053-I-1, declining review of the initial decision of the administrative judge ("AJ") sustaining Parker's removal for loss of her security clearance. Because we conclude that substantial evidence supports the Board's decision sustaining Parker's removal and because the

Board properly declined to decide the other issues presented, we affirm.

BACKGROUND

Ms. Parker was employed as a Security Assistance Analyst, GM-1101-15, in the Defense Security Cooperation Agency ("Agency"). The Agency designated this position "special sensitive" and it therefore required a top secret security clearance. On October 4, 2000, the Agency informed Parker that it had made a tentative determination to revoke her eligibility for access to classified information and/or occupancy of a sensitive position. On December 20, 2000, the Agency revoked Parker's security access and on March 28, 2001 the Agency suspended parker indefinitely. The Agency denied parker's appeal of its revocation of her security clearance on August 2, 2001. On September 5, 2001, the Agency issued a decision to remove Parker because she lacked the security clearance necessary for her position. Parker resigned on September 14, 2001.

DISCUSSION

We will affirm a decision of the Board unless it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. 5 U.S.C. § 7703(c) (2000).

I.

Before the Board, agencies must prove charges supporting a removal by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B) (2000). Parker argues that the Board failed to do so, because it erred in determining her position required a security clearance. The record belies her argument, however, as there was testimony that "within the agency all positions are required to have a secret clearance or higher" and documentary evidence in the form of a standard Agency form identifying her position as "special sensitive." This constitutes substantial evidence supporting the Board's decision.

Parker also argues that the Board erred by declining to consider whether her security clearance was properly revoked. The Board was correct, however, in its determination that it lacked jurisdiction to consider the propriety of the Agency's revocation of Parker's security clearance. "[I]t would be improper, without a clear directive from Congress, to allow a non-expert body, such as the Merit Syste3ms Protection Board, to review the merits of [security clearance] determinations." Hesse v. Dep't of State, 217 F.3d 1372 (Fed. Cir. 2000).

Parker next apparently argues that the Agency's procedures denied her due process. This argument also fails. First of all, "this court has held, the Due Process Clause of the Fifth Amendment has no application to a proceeding to review an employee's security clearance." Id. At 1381 (citing Jones v. Dep't of the Navy, 978 F.2d 1223, 1225-26 (Fed. Cir. 1992)). To the extent Parker argues she was given insufficient notice or explanation of the Agency's reasons for revoking her clearance, we note that the Agency provided Parker with its reasons for revoking her clearance and gave her an opportunity to respond to that reason. As in Hesse, "[d]ue process did not require a fuller explanation." Id. At 1382.

II.

Parker also asserts various other defenses to her removal, including, discrimination under the Civil Rights Act of 1964, the Whistsleblower Protection Act, the Uniformed Services Employment and Reemployment Act of 1994, and violations of various portions of the Constitution. We must also reject these arguments. First, this court lacks jurisdiction to reach the merits of a discrimination claim. Spears v. Merit

Systems Protection Board, 766 F.2d 520, 522 (Fed. Cir. 1985). Board decisions reaching the merits of discrimination claims must be appealed in the district courts, and not to this court. 5 U.S.C. § 7703(b)(1); Spears, 766 F.2d at 522. Second, no statute (citing by Parker, or otherwise) authorizes the Board to review security clearance determinations. See Hesse, 217 F.3d at 1377-80. Third, parker has not identified any constitutional reason why the Agency should not remove her from her position given her loss of security clearance.

CONCLUSION

For all the reasons stated above, we affirm the Board's determination that the Agency's removal should be sustained.

United States Court of Appeals for the Federal Circuit

Information Sheet

Filing a Petition for Writ of Certiorari

There is no automatic right of appeal to the Supreme Court of the Unites States from judgments of the Federal Circuit. You must file a petition for writ of certiorari which the Supreme Court will grant only when there are compelling reasons. (See Rule 10 of the Rules of the Supreme Court of the United States, hereinafter called Rules.)

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. [The time does not run from the issuance of the mandate, which has no effect on the right to petition.] (See Rule 13 of the Rules.)

Fees. Either the $300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. (See Rules 38 and 39)

Authorized Filer. The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner representing himself or herself.

Format of a Petition. The Rules are very specific about the order of the required information and should be consulted before you start drafting your petition. (See Rule 14.) Rules 33 and 34 should be consulted regarding type size and font, paper size, paper weight, margins, page limits, cover, etc.

Number of Copies. Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of the petition for writ of certiorari and of the motion for leave to proceed in forma pauperis. (See Rule 12.)

Where to File. You must file your documents at the Supreme Court.

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(202) 479-3000

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.

Access to the Rules. The current rules can be found in Title 28 of the United States Code Annotated and other legal publications available in many public libraries.

Fed. Cir. DECISION 03-3152, Jul 14, 2003

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Questions and Answers

Petitions for Panel Rehearing (Fed. Cir. R. 40)
And
Petitions for Hearing or Rehearing En Banc (Fed. Cir. R 35)

Q. When is a petition for panel hearing appropriate?

A. Petitions for panel rehearing are rarely considered meritorious. Consequently, it is easiest to first answer when a petition for panel rehearing is not appropriate. A petition for panel rehearing should not be used to reargue issues already briefed and orally argued. If a party failed to persuade the court on an issue in the first instance, they do not get a second chance. This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36, as a disposition of this nature is used only when the appellant/petitioner has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance.

Thus, as a usual prerequisite, the court must have filed an opinion in support of its judgment for a petition for panel rehearing to be appropriate. Counsel seeking panel rehearing must be able to identify in the court's opinion a material error of fact or law, the correction of which would require a different judgment on appeal.

Q. When is a petition for rehearing en banc appropriate?

A. En banc decisions are extraordinary occurrences. To properly answer the question, one must first understand the responsibility of a three-judge merits panel of the court. The panel is charged with deciding individual appeals according to the law of the circuit as established in the court's precedential opinions. While each merits panel is empowered to enter precedential opinions, the ultimate duty of the court en banc is to set forth the law of the Federal Circuit, which merits panels are obliged to follow.

Thus, as a usual prerequisite, a merits panel of the court must have entered a precedential opinion in support of its judgment for a petition for rehearing en banc to be appropriate. In addition, the party seeking rehearing en banc must show that either the merits panel has failed to follow decisions of the Supreme Court of the United States or Federal Circuit precedential opinions, or that the merits panel has followed circuit precedent, which the party seeks to have overruled by the count en banc.

Q. How frequently are petitions for panel rehearing granted by merits panels or petitions for rehearing en banc granted by the court?

A. The data regarding petitions for panel rehearing since 1982 shows that merits panels granted some relief in only three percent of the petitions filed. The relief granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision.

En banc petitions have been granted less frequently. Historically, the court has initiated en banc review in a few of the appeals decided en banc since 1982.

Q. Is it necessary to have filed either of these petitions before filing a petition for certiorari in the U.S. Supreme Court?

A. No. All that is needed is a final judgment of the Court of Appeals.

Excerpt (pages 4 & 5)
Transcript of December 19, 2002 MSPB Hearing[1][2]
PROCEEDINGS

JUDGE BOGLE: The Washington Regional Office of the Merit Systems Protection Board has an appeal filed by Glenda G. Crook from action taken by the Department of Defense.

Ms. Crook represents herself and the Agency is represented by Gilah G. Goldsmith. My name is Elizabeth Bogle and I am the assigned administrative judge.

We had some discussion this morning about – again, about the very limited nature of the Board's jurisdiction in this case. The Agency has made a settlement offer, but Ms. Crook has not accepted the offer and after some discussion, I guess we have determined that we will go ahead with the hearing.

Ms. Crook did file this morning a Motion to Compel Discovery.

Ms. Goldsmith, do you have copy?

MS. GOLDSMITH: Yes. Is this different from the ones that she filed previously?

JUDGE BOGGLE: Not much, but a little bit. She did file one on December 17th, the day that I issued the prehearing conference summary. The Agency filed a written objection to that, that none of the information -- basically stating that the information she sought was not reasonably calculated to lead to discovery of relevant information, and I agree with that given, as I've said repeatedly, the very limited nature of the Board's jurisdiction in this proceeding.

So the motion filed on December 17th, as well as the motion filed this morning are denied for that reason that the

---

[1] ABLE REPORTING (301) 627-8210

Excerpt (pages 4 & 5) Cont'd
Transcript December 19, 2002 MSPB Hearing
PROCEEDINGS

information sought simply isn't relevant or reasonably calculated to lead to something that would be relevant.

MS. CROOK: I object, your Honor. This issue is whether or not the position required a clearance and whether or not it was revoked. The information requested is directly related to those two issues.

JUDGE BOGLE: And let me just add here that a moment ago I explained to the parties that notwithstanding my December 17th conference summary, because I have explained the limited jurisdiction the Board has, and I do not understand what Ms. Crook feels is before the Board – within the Board's jurisdiction in this case. I want her to testify first. And I would......[1]

---

[1] ABLE REPORTING (301) 627-8210

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GLENDA G. CROOK, Appellant,	DOCKET NUMBER DC-0752-02-0053-I-1
v.	(Rec'd by appellant Dec 21, 2002)
DEPARTMENT OF DEFENSE, Agency.	DATE: Dec 19 2002

Glenda G. Crook, Alexandria, Virginia, pro se.

Gilah G. Goldsmith, Esquire, Washington, D.C., for the agency

BEFORE

Susanne T. Marshall, Chairman
Beth S. Slavet, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
For the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must fie with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site http://www.mspb.gov.

FOR THE BOARD: s/Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Washington College of Law
Civil Practice Clinic
4801 Massachusetts Avenue, NW
Washington, DC 20016

Glenda G. Crook
621 N. Saint Asaph St. # 209
Alexandria, VA 22314

By regular mail to:

Gilah G. Goldsmith
Department of Defense
Washington Headquarters Services OGC
1155 Defense Pentagon, Room 1D197
Washington, DC 20301-1155

Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
Washington Regional Office
1800 Diagonal Road, Suite 205
Alexandria, VA 22314

CERTIFICATE OF SERVICE Con'td

By hand to:

Office of the Special Counsel
1730 M Street, N.W.
Suite 201
Washington, DC 20036-4505

December 19, 2002
(Date)

s/Marie A. Warcholak
Marie A. Warcholak
Legal Assistant

Washington, DC

UNITED STATE OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

GLENDA G. CROOK, Appellant,	DOCKET NUMBER DC-0752-02-0053-I-1
v.	(Rec'd by Appellant Jan 18, 2002)
DEPARTMENT OF DEFENSE, Agency.	DATE: Jan 17, 2002

American University Clinical Law Program, Washington College of Law, Washington, D.C.

Gilah G. Goldsmith, Esquire, Washington, D.C., for the agency.

BEFORE

Elizabeth B. Bogle
Administrative Judge

INITIAL DECISION

On October 29, 2001, the appellant filed an appeal from an agency decision to remove her from the position of Security Assistance Analyst, GM-1101-15, in the Defense Security Cooperation Agency. The Board has jurisdiction over the appeal. *See* 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d). For the following reasons, the agency action is AFFIRMED.[1]

---

[1] The appellant has designated the American University Clinical Law Program to represent her and moved to reopen the record. The record in this case closed at the conclusion of the hearing on December 19, 2001. 5 C.F.R. § 1201.58. Once the record closes, no additional evidence or

Background

The appellant's Security Assistance Analyst position was designated Special Sensitive. Appeal File (AF) tab 4, subtab 4j. By notice dated October 4, 2000, the appellant was informed that a tentative determination had been made to revoke her eligibility for access to classified information and/or occupancy of a sensitive position. AF tab 4, subtab 4h. A "statement of reasons" was attached to the notice, and the appellant was afforded an opportunity to reply. On December 20, 2000, the agency revoked the appellant's security access. AF tab 4, subtab 4g. Beginning on March 28, 2001, the appellant was indefinitely suspended. AF tab 4, subtab 4f. The appellant's appeal of the revocation action was denied on August 2, 2001. AF tab 4, subtab 4e.

By notice dated August 28, 2001, Beth M. Baker, Policy and Plans Division, proposed the appellant's removal because her position required a top secret security clearance, and her security clearance had been revoked. AF tab 4, subtab 4c. The appellant was afforded an opportunity to reply, but she did not submit a reply. By memorandum dated September 5, 2001, Keith Webster Director, Policy, Plans and Programs Directorate, issued a decision to remove the appellant. AF tab 4, subtab 4b. The appellant resigned in lieu of removal on September 14, 2001, and was granted discontinued service retirement.

Legal standard

In *Jones v. Department of the Navy,* 48 M.S.P.R. 680, 689 (1991), *aff'd,* 978 F.2d 1223 (Fed. Cir. 1992), the Board held that an agency may indefinitely suspend an employee

---

argument will be accepted unless it was not readily available before the record closed. *Id.* Because the appellant's designation of a representative is not a basis for reopening the record and because the appellant has not otherwise established a basis for reopening the record, her motion is DENIED.

based on the suspension of her security access, or pending its investigation of her security clearance, where the agency believes that her retention in a duty status would be detrimental to government interests. The Board further found that it lacks the authority to review the merits of an agency's suspension of an employee's security access. *Id.* at 690, *citing, Department of the Navy v Egan*, 484 U.S. 518, 527-32, 108 S.Ct. 818, 824-26, 98 L.Ed.2d 918 (1988).

In *Kriner v. Department of the Navy,* 61 M.S.P.R. 526 (1994), the Board reaffirmed that an agency ay indefinitely suspend an employee based on its prior action with respect to her security access and that the Board may not inquire into the merits of the agency's reasons for the security access decision; the Board nonetheless held that it must assure that minimum due process requirements were accorded in the indefinite suspension action. Thus, where an indefinite suspension is based on the relocation of access to security areas or information, the agency must provide the appellant with a meaningful opportunity to respond to the reasons for the indefinite suspension by ensuring that either in the advance notice of that action, or in the earlier access determination, she has been notified of the cause that led to the access determination. Because an employee against whom an adverse action such as an indefinite suspension is taken is entitled to notice of the specific reasons for that action and to an opportunity to address those reasons in her response to the agency's proposal, only in this manner does the agency assure that the appellant is afforded meaningful due process with respect to her constitutionally protected property interest in her employment. *See, e.g., Holley v. Department of the Navy,* 62 M.S.P.R. 300, 303-04 (1994), *citing, Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985); *Stephen v. Department of the Air Force,* 47 M.S.P.R. 672, 681 (1991). The same analysis applies to a removal appeal. *Mantos v. Department of the Navy.* 62 M.S.P.R. 117, 119

(1994); *Germino v. Department of Defense*, 61 M.S.P.R. 686-87 (1994).

The appellant's position required a security clearance

The Board lacks authority to review the agency's reasons for imposing a security clearance requirement as a condition of employment for a position. *See West v. Department of the Navy*, 63 M.S.P.R. 86, 88-89 (1994). In reviewing an adverse action based on the revocation of a security clearance, however, the Board may inquire whether the agency has established that a security clearance was required for the position in question. *Id.*

The appellant's position description provided four possible levels of sensitivity: Non-sensitive, Noncritical-Sensitive, Critical-Sensitive, and Special-Sensitive. The appellant's position was designated Special-Sensitive. Mr. Webster testified that without exception all employees of the Defense Security Cooperation Agency (DSCA) are required to have a security clearance. Tr. At 16, 28. His testimony was consistent with that of Arthur R. Kel[t]z, Deputy Director, and Jacqueline Manuel, Personnel Officer, at the hearing in the appellant's indefinite suspension appeals.[2] Citing DOD 5200.2-R, paragraph C3.1.2 (criteria for security designation of positions), the appellant argued that her position did not require a security clearance. Appellant's exhibit A, Tr. At 23. Pursuant to that paragraph, civilian positions of the Department of Defense are designated Non-sensitive, Noncritical-Sensitive, or Critical-Sensitive. The paragraph does not address the designation of Special-Sensitive. While it is unclear from the record when the Special-Sensitive designation applies, this does not provide a basis for concluding that a position designated Special-Sensitive does not require a security clearance. Because the appellant's position was designated sensitive and based on Mr. Webster's testimony that all DSCA employees are required to have a security clearance, I conclude that the appellant's position required her to have a security clearance.

---

[2] The appellant furnished a copy of the transcript of that hearing as evidence in this appeal. AF tab 1, exhibit 13.

The appellant was afforded meaningful due process

The agency afforded the appellant her adverse action procedural rights under 5 U.S.C. chapter 75 by providing her prior written notice of the reason for the action, an opportunity to reply orally and in writing, a written decision, and notice of appeal rights. The appellant, I conclude, was afforded meaningful due process in the removal action.

The appellant alleged that the agency could have reassigned her to a nonsensitive position following the revocation of her security clearance. To be entitled to a reassignment, the appellant would be required to show that the agency had a policy, manifested by regulations, requiring such reassignment. *See Hesse v. Department of State,* 82 M.S.P.R. 489, 492 (1999); *Vanduzer v. Department of the Navy,* 41 M.S.P.R. 357, 361-62 (1989). None of the agency regulations cited by the appellant would require her reassignment in these circumstances.

Finally, the appellant alleged that the agency committed prohibited personnel practices including discrimination and reprisal. It is well settled that the Board lacks jurisdiction over these affirmative defenses when raised in connection with a removal based on the revocation of a security clearance. *See Hesse v. Department of State,* 82 M.S.P.R. at 493, *citing Hinton v. Department of the Navy,* 61 M.S.P.R. 692, 697 (1994).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: s/Elizabeth B. Bogle
Elizabeth B. Bogle
Administrative Judge

NOTICE TO THE PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on __________, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually received the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision you may file a petition with:

The United States Court of Appeals
For the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant
Glenda G. Crook
621 N. Saint Asaph St. # 209
Alexandria, VA 22314

Appellant's Representative
American University
Washington College of Law
Civil Practice Clinic
4801 Massachusetts Ave., NW.
Washington, DC 20016

Agency's Representative
Gilah G. Goldsmith
Department of Defense
Washington Headquarters Services/OGC
1155 Defense Pentagon, Room 1D197
Washington, DC 20301-1155

Other
Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 E Street, NW, Room 7412
Washington, DC 20415

January 17, 2002
(Date)

s/Eric W. Hawthorne
Eric W. Hawthorne
Paralegal Specialist

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GLENDA GAIL PARKER	FILED OCT 27 2003
Plaintiff,	Clerk, US District Court
v.	Alexandria, Virginia
DEPARTMENT OF DEFENSE	
Defendant.	(Rec'd by plaintiff Oct 31, 2003)

AMENDED MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint for lack of jurisdiction pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. This case concerns Plaintiff's appeal to this Court for review of unfavorable rulings by the Merit Systems Protection Board ("MSPB") and the United States Court of Appeals for the Federal Circuit ("Federal Circuit").[1] The issue raised in this Motion to Dismiss is whether this Court has jurisdiction to consider Plaintiff's appeal when Plaintiff waived her opportunity to present her discrimination and nondiscrimination claims before the District Court, and instead sought review by the Federal Circuit, which docketed and decided her nondiscrimination claims only.

Upon review of Defendant's Motion to Dismiss and Plaintiff's Motions in Opposition to Defendant's Motion to Dismiss, the Court grants the motion because Plaintiff waived her right to pursue her Title VII discrimination claims in this district court when she signed a waiver of these claims and submitted her appeal to the Federal Circuit.

---

[1] Defendant revoked Plaintiff's security clearance, and her employment was later terminated – described in detail infra.

BACKGROUND

Glenda Gail Parker ("Parker"), Plaintiff, worked as a security assistance analyst for Defendant[2] from December 1995 until she was indefinitely suspended from pay and duty on March 23, 2001. As a security assistance analyst, Parker required a top secret security clearance. Because of instances of irrational behavior and as a result of concerns about Parker's performance and conduct, the DSCA was reluctant to entrust sensitive duties to her. Therefore, on April 10, 1998, she was administratively reassigned to other duties. While administratively reassigned, Parker continued to exhibit irrational behavior.

On March 23, 2001, following a psychiatric evaluation and administrative process, Keltz imposed a suspension from pay and duty pursuant to a decision that no meaningful work could be assigned to Parker because of the revoked security clearance. On April 25, 2001, Parker appealed her indefinite suspension to the Merit Systems Protection Board ("MSPB"). In Parker's appeal, she alleged that she was suspended in reprisal for whistleblowing and for her seeking military service. On August 23, 2001, the MSPB sustained Parker's indefinite suspension. Parker appealed the MSPB determination. On August 2, 2001, in a separate review and determination, the Clearance Review Board)"CAB") decided not to reinstate Parker's security clearance pending the outcome of the MSPB appeal.

On October 29, 2001, Parker simultaneously filed a petition for Review of the MSPB's sustainment of her security clearance revocation and a new MSPB appeal of her removal from employment. On appeal, an MSPB Administrative Law Judge ("A.L.J.") sustained Parker's removal on January 17, 2002 and noted that the A.L.J. lacked jurisdiction to further review Parker's appeal. On February 16, 2002, Parker petitioned the MSPB to review the A.L.J.'s decision, but the petition was denied. On February 19, 2003, Parker filed a pro se petition with the Federal Circuit for review of the final decision made by the MSPB on the revocation of her security clearance and removal from employment.

---

[2] Parker was a GS-15 Security Assistance Analyst with the Defense Security Cooperation Agency ("DSCA"), an agency of Defendant the Department of Defense (:DOD").

In accordance with an appeal to the Federal Circuit, Parker filed a Federal Circuit Rule 15(c) waiver `of discrimination claims ("Rule 15(c)") with the clerk of the Federal Circuit on April 1, 2003. By order dated May 23, 2003, the Federal Circuit informed the parties that the appeal will be submitted to a three judge panel on July 11, 2003. In the Government's Second Report to the Court Regarding the Federal Circuit's Decision in this Case, filed on July 24, 2003, the Government avers that Parker's appeal was heard by the Federal Circuit, and that the court affirmed the MSPB's decision.[3] (Def.'s 2d Report at 1.)

I. ANALYSIS

A. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the Court should accept as true all well-plead allegations of the complaint and view the complaint in the light most favorable to the plaintiff. Mylan Lab., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993); Fed. R. Civ. P. 12(b)(6). The Court should grant a motion to dismiss for failure to state a claim only if it appears to a certainty that the plaintiff cannot prove any set of facts in support of its claim that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The Court's analysis will determine if this Court has jurisdiction to decide Parker's appeal. To that end, the Court must first decide if it has jurisdiction over a claim after it has already been docketed and decided by the Federal Circuit. Second, if the Court does have jurisdiction to hear the appeal, the Court will decide if it has jurisdiction to hear appeals of government employees who were terminated following revocation of their security clearance.

---

[3] Crook v. Dep't of Defense, 71 Fed. Appx. 54, 2003 WL 21675126, at *1 (Fed. Cir. July 14, 2003) (Crook now known as Glenda Gail Parker) (not cited for authority).

B. Analysis

The Court holds that Plaintiff fails to state a claim upon which relief may be granted because she fails to demonstrate that this Court has jurisdiction to hear her appeal. This ruling is founded on settled principles that a litigant may not have "two bites of the apple." Plaintiff waived her opportunity to remove her appeal to the district court, where both her discrimination and non-discrimination claims could be heard, when she appealed to the Federal Circuit. In addition, the Federal Circuit has already ruled on the merits of the nondiscrimination claims raised in that forum. Therefore, because Parker waived her discrimination claims and the nondiscrimination claims have been decided by the Federal Circuit, this Court has no jurisdiction. Accordingly, Defendant's Motion to Dismiss is granted.

1. Parker Waived her discrimination claims to gain forum in the Federal Circuit

Plaintiff waived her opportunity to appeal to the district court for review of her discrimination and nondiscrimination claims. The Guide for Pro Se Petitioners and Appellants ("Guide") issued by the Federal Circuit provides that:

> This court does not have jurisdiction to review cases involving bona fide claims of discrimination…that were raised before the Merit Systems Protection Board. If your case involves such claims and you are unwilling to abandon the forever, you

> must proceed in a district court....*You may waive your discrimination claims on the Federal Circuit Rule 15(c) form sent to you by the court*...A discrimination issue raised for the first time in this court does not affect the jurisdiction of the court to decide the issues raised before the Board, and such a discrimination claim will be disregarded.

Fed. Cir. R. apps. At 133 (Guide for Pro Se Petitioners and Appellants) (emphasis added). Rule 15(c) provides in pertinent part that:

> Within 14 days after a petition for review of a decision of the Merit Systems Protection Board ... is docketed, the petitioner must serve on the respondent and file with the clerk:
>
> (A) one of the following statements:
>
> (i) no claim of discrimination by reason of race, sex, age, national origin, or handicapped condition has been or will be made in the case;
>
> (ii) any claim of discrimination ... raised before the Board has been abandoned and will not be raised or continued in this or any other court:
>
> (iii) the petition seeks review only of the Board's dismissal of the case for lack of jurisdiction or for untimeliness; ...
>
> (B) a statement whether petitioner has filed a discrimination case;
>
> (i) in a United States district court; or

(ii) in the Equal Employment Opportunity Commission.

Thus, an appellant must either file a written waiver of her discrimination claims or she must remove her case to the appropriate district court for review. Davidson v. United States Postal Service, 24 F.3d 223, 223-224 (Fed. Cir. 1994) (ordering that petitioner must file "either (1) a request for the [Federal Circuit] to proceed which must be accompanied by the appropriate waiver, or (2) a request for transfer to a particular United States district court."); Williams v. Dep't of the Army, 715 F.2d 1485 (Fed. Cir. 1983) (holding that the Federal Circuit has no jurisdiction over the merits of a mixed case i.e., one involving an adverse action and a claim of discrimination); Daniels v. United States Postal Service, 726 F.2d 723, 724 (Fed. Cir. 1984) (ruling that a waiver of a claim of discrimination must be by an express written statement).

Furthermore, an appellant is precluded from relitigating discrimination claims before the district court when he splits his discrimination and nondiscrimination claims between the Federal Circuit and the district court. Smith v. Horner, 846 F.2d 1521, 1524 (D.C. Cir. 1988) (The appellant "could also be held precluded from litigating his Title VII claim because he "split" his two claims. [The appellant] chose to litigate his disability claim in a court (the Federal Circuit) that could hear less than his entire claim instead of going to the district court ….").

In Smith, the appellant chose to dispose of his nondiscrimination claims before the Federal Circuit. Id. at 1523. The Clerk advised the appellant that the Federal Circuit will not hear discrimination claims, but rather, he may remove his claim to the district court, which can hear both his discrimination and nondiscrimination claims. Id. at 1522-23. The Court of Appeals ruled that the appellant waived her Title VII claim by signing the written waiver of her discrimination claims she filed in the Federal Circuit.

Furthermore, to permit an appellant to pursue [her] discrimination claim in the District Court notwithstanding [her] waiver in the Federal Circuit would undermine that court's "efforts to prevent sequential forum shopping." Id. at 1524.

In the instant case, Defendant avers, and Parker does not refute, that she submitted a Rule 15(c) waiver of her discrimination claims to the Federal Circuit on April 1, 2003 (Def.'s Mot. Dismiss at 9), and Parker filed the instant appeal with this Court on April 4, 2003. (Pl.'s Notice Appeal at 1). Parker's appeal was set for review by a three judge panel on July 11, 2003, and the Federal Circuit affirmed the MSPB's determination on July 14, 2003. Hence, because Parker waived her Title VII claims and submitted her appeal to the Federal Circuit, which cannot hear discrimination claims, she effectively waived her discrimination claims forever. Therefore, she fails to state a claim upon which relief may be granted.

2. Parker's nondiscrimination claims were docketed and decided by the Federal Circuit

Parker also fails to state a claim for which relief may be granted because her appeal was docketed and decided by the Federal Circuit. The Guide alerts the pro se petitioner that the Federal Circuit will not hear discrimination claims, but rather, such claims must either be abandoned forever or removed to district court. Fed. Cir. R. apps. At 132 (Guide for Pro Se Petitioners and Appellants). Parker had the opportunity to litigate both claims before a court of competent jurisdiction, but instead chose to split them. The Federal Circuit docketed Parker's appeal on May 23, 2003 for hearing on July 11, 2003, affirming the determination of the MSPB.[4] Thus Parker may not waive her discrimination claims to secure a forum in the Federal Circuit, quickly assert her discrimination claims in this Court, and then hope to gain a second review by reasserting her discrimination claims. Litigants are precluded from "two bites at the apple."[5] Therefore, Parker fails to state a claim upon which relief may be granted because she waived her opportunity to appeal to this forum and her appeal was decided by the Federal Circuit. Accordingly, Plaintiff's claim is dismissed for lack of jurisdiction, and Defendant's Motion to Dismiss is granted.

---

[4] Supra note 3.

II. CONCLUSION

Defendant's Motion to Dismiss is granted because Plaintiff waived her opportunity to have both her discrimination and nondiscrimination claims decided by this Court when she submitted her case to the Federal Circuit. By agreeing to waive her discrimination claims, she abandoned her discrimination claims forever. Accordingly, it is hereby ORDERED that Defendant the Department of Defense's motion to Dismiss is GRANTED.

The Clerk is directed to enter judgment in favor of the Department of Defense and against Glenda Gail Parker pursuant to Federal Rule of Civil Procedure 58. Fed. R. Civ. P. 58.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 27th day of OCTOBER, 2003.[6]

s/Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
10/27/2003

---

[5] Smith, 846 F.2d at 1524.

[6] Appealed to the Fourth Circuit Nov 25, 2003, Docket No. 03-2483, decision pending.

United States Court of Appeals for the Federal Circuit

ORDER[1]

Before **NEWMAN**, Circuit Judge, **MICHEL**, Circuit Judge, and **RADER**, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on September 17, 2003.

FOR THE COURT,
s/Jan Horbaly
Clerk

Dated: September 10, 2003

Cc: Glenda Gail Parker
Kyle Chadwick

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
SEP 10 2003
JAN HORBALY
CLERK

CROOK V DEFENSE, 033152
(MSPB – DC0752020053-I-1)

---

[1] Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUGEMENT ENTERED: 07/14/03

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and petitions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Petitioner(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should e made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

s/JAN HORBALY
Clerk

Cc: GLENDA GAIL PARKER
KYLE CHADWICK

CROOK V DEFENSE, 03-3152
MSPB-DC0752020053-I-1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FILED
OCT 27 2003
Clerk, U.S. District Court
Alexandria, Virginia

Glenda Gail Parker

v. **(Rec'd Oct 31, 2003)**
Civil Action 03-0431-A

Department of Defense

JUDGMENT

Pursuant to the order of this Court entered on October 27, 2003 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the Defendant, Department of Defense, against the Plaintiff, Glenda Gail Parker.

ELIZABETH H. PARET, CLERK

s/By: Jenny Cupp
Deputy Clerk

Alexandria, Virginia
October 27, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FILED
OCT 27 2003
Clerk, U.S. District Court
Alexandria, Virginia

GLENDA GAIL PARKER
Plaintiff,

v. Civil Action No. 03-431-A
(Rec'd by plaintiff Oct 31, 2003)

DEPARATMENT OF DEFENSE,
Defendant.

AMENDED JUDGMENT

Pursuant to the Court's Opinion of October 27, 2003, wherein the Court granted the Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court hereby

ORDERS the Clerk to enter JUDGMENT in favor of the Defendant, Department of Defense, and against the Plaintiff, Glenda Gail Parker, pursuant to Rule 58 of the Federal Rules of Civil Procedure, and the case is hereby DISMISSED.

The Clerk is directed to forward a copy of the Order to counsel.

Entered this 27th day of October, 2003.

sGerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
10/27/03

U.S. Constitution

Article II

Section 1…

…Before he enter on the execution of his office, he shall take the following oath or affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, **preserve, protect and defend the Constitution of the United States."**

Section 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur;…

Section 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; **he shall take care that the laws be faithfully executed,** and shall commission all the officers of the United States.

U.S. Constitution

Section 8. The **Congress shall have power to** lay and collect taxes, duties, imposts and excises, to pay the debts and **provide for the common defense and general welfare of the United States**; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, **and make rules concerning captures on land and water**;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

U.S. Constitution

Bill of Rights

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the press; or the right of the people peaceably to assemble, and **to petition the government for a redress of grievances.**

Amendment IV

The right of the people to be secure in their persons, houses, **papers, and effects**, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation**.

TITLE 3 CHAPTER 5 SUBCHAPTER I Sec. 401.

Sec. 401. - Definitions

(a) In General. - Except as otherwise specifically provided in this chapter, as used in this chapter:

(1) Board. - The term "Board" means the Merit Systems Protection Board under chapter 12 of title 5.

(2) Covered employee. - The term "covered employee" means any employee of an employing office.

(3) Employee. - The term "employee" includes an applicant for employment and a former employee.

(4) Employing office. - The term "employing office" means -

(A) each office, agency, or other component of the Executive Office of the President;

(B) the Executive Residence at the White House; and

(C) the official residence (temporary or otherwise) of the Vice President.

(b) Definitions Relating to Certain Matters. - For purposes of applying this chapter with respect to any practice or other matter -

(1) to which section 411 relates, the terms "employing office" and "covered employee" shall each be considered to have the meaning given to the term by such section;

(2) to which section 412 relates, the term "covered employee" means a covered employee described in section 412(a)(2)(B);

(3) to which section 413 relates, the term "covered employee" excludes interns and volunteers, as described in section 413(a)(2); and

(4) to which section 416 relates, the term "covered employee" means a covered employee described in section 416(a)(2)

TITLE 3 CHAPTER 5 SUBCHAPTER I Sec. 402.

Sec. 402. - Application of laws

The following laws shall apply, as prescribed by this chapter, to all employing offices (including employing offices within the meaning of section 411, to the extent prescribed therein):

(1) The Fair Labor Standards Act of 1938.

(2) **Title VII of the Civil Rights Act of 1964.**

(3) The Americans with Disabilities Act of 1990.

(4) The Age Discrimination in Employment Act of 1967.

(5) The Family and Medical Leave Act of 1993.

(6) The Occupational Safety and Health Act of 1970.

(7) **Chapter 71 (relating to Federal service labor-management relations) of title 5.**

(8) The Employee Polygraph Protection Act of 1988.

(9) The Worker Adjustment and Retraining Notification Act.

(10) The Rehabilitation Act of 1973.

(11) **Chapter 43 (relating to veterans' employment and reemployment) of title 38**

TITLE 3 CHAPTER 5 SUBCHAPTER III Sec. 451.

Sec. 451. - Procedure for consideration of alleged violations

The procedure for consideration of alleged violations of part A of subchapter II consists of -

(1) counseling and mediation as provided in section 452; and

(2) election, as provided in section 453, of either -

(A) an administrative proceeding as provided in section 453(1) **and judicial review** as provided in section 1296 of title 28; or

(B) a civil action in a district court of the United States as provided in section 1346(g) of title 28

TITLE 3 CHAPTER 5 SUBCHAPTER III Sec. 453.

Sec. 453. - Election of proceeding

Not later than 90 days after a covered employee receives notice of the end of the period of mediation, but no sooner than 30 days after receipt of such notification, such covered employee may either -

(1) file a complaint with the appropriate agency, as determined under section 454; or

(2) file a civil action under section 1346(g) of title 28

TITLE 5 PART I CHAPT 5 SUBCHAPT II Sec. 552a.

Sec. 552a. - Records maintained on individuals

(a) Definitions. - For purposes of this section -

(1) the term "agency" means agency as defined in section 552(e) [1] of this title;

(2) **the term "individual" means a citizen of the United States** or an alien lawfully admitted for permanent residence;

(3) **the term "maintain" includes maintain, collect, use, or disseminate**;

(4) **the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;**

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying **particular assigned to the individual**;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and **not used in whole or in part in making any determination about an identifiable individual**, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is **compatible with the purpose for which it was collected**;

(8) the term "matching program" -

(A) means any computerized comparison of -

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of -

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include -

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information

(I) pursuant to section 6103(d) of the Internal Revenue Code of 1986,

(II) for purposes of tax administration as defined in section 6103(b)(4) of such Code,

(III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or

(IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches -

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency; if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986; or

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal

Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of Disclosure. -

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be -

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of Certain Disclosures. -

Each agency, with respect to each system of records under its control, shall -

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of -

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to Records. -

Each agency that maintains a system of records shall -

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and -

> **(A)** not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and
>
> **(B)** promptly, either -
>
> > **(i)** make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or
> >
> > **(ii)** inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) **permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the**

refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency Requirements. -

Each agency that maintains a system of records shall -

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual -

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal **purpose or purposes for which the information is intended to be used**;

(C) **the routine uses which may be made of the information,** as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, **publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records**, which notice shall include -

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) **each routine use of the records contained in the system**, including the categories of users and the purpose of such use;

(E) **the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records**;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) **maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination**;

(6) **prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;**

(7) **maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;**

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such

person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, **publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and**

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency Rules. -

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall -

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)

(1) Civil Remedies. -

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)

(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, **the court may order the agency to amend the individual's record** in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)

(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph **in which the complainant has substantially prevailed.**

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section **in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of -**

(A) **actual damages sustained by the individual** as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; **and**

(B) **the costs of the action together with reasonable attorney fees as determined by the court.**

(5) **An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides**, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, **except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.** Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of Legal Guardians. -

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i) Criminal Penalties

(1) **Any** officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, **agency records which contain individually identifiable information the disclosure of which is prohibited by this section** or by rules or regulations established thereunder, **and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it,** shall be guilty of a misdemeanor and fined not more than $5,000.

(2) **Any** officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) **Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses** shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General Exemptions. -

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is -

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of **criminal laws**, including police efforts to prevent, control, or reduce crime or **to apprehend criminals**, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of

(A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;

(B) information compiled for the purpose of a **criminal** investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(C) reports identifiable to an individual compiled at any stage of the process of enforcement of the **criminal** laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific Exemptions. -

The head of any agency **may promulgate rules, in accordance with the requirements** (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is -

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for **law enforcement purposes,** other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) **investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information**, **but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section,** under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l) Archival Records.

(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record **and shall be subject to the provisions of this section.** The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record **pertaining to an identifiable individual** which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record **pertaining to an identifiable individual** which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m)

(1) Government Contractors. -

When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing Lists. -

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching Agreements. -

(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying -

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for **providing individualized notice at the time of application, and notice periodically thereafter** as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to -

> **(i)** applicants for and recipients of financial assistance or payments under Federal benefit programs, and
>
> **(ii)** **applicants for and holders of positions as Federal personnel**,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for **verifying information** produced in such matching program as required by subsection (p);

(F) procedures for the retention **and timely destruction of identifiable records created** by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication **and redisclosure of records provided by the source agency within or outside the recipient agency** or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) **information on assessments that have been made on the accuracy of the records** that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)

(A) **A copy of each agreement** entered into pursuant to paragraph (1) shall -

- **(i)** be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and
- **(ii)** be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if -

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and Opportunity to Contest Findings. -

(1) In order **to protect any individual** whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program **to such individual, or take other adverse action against such individual**, as a result of information produced by such matching program, until -

(A)

(i) the agency has independently **verified** the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that -

(I) the **information is limited** to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a **high degree of confidence that the information provided to the recipient agency is accurate;**

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C)

(i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) **requires** investigation and **confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual**, including where applicable investigation and confirmation of -

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the **public** health or public safety may be **adversely affected or significantly threatened** during any notice period required by such paragraph.

(q) Sanctions. -

(1) Notwithstanding any other provision of law, **no source agency may disclose any record which is contained in a system of records** to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless -

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on New Systems and Matching Programs. -

Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial Report. -

The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report -

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t)

(1) Effect of Other Laws. -

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) Data Integrity Boards. -

(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board -

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including -

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on **any agency matching activities** that are not matching programs.

(4)

(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective. [2] "cost-effective."

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)

(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that -

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) **the matching program is in the public interest.**

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, **if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.**

(v) Office of Management and Budget Responsibilities. -

The Director of the Office of Management and Budget shall -

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies

---

[1] See References in Text note below.

[2] So in original. Probably should be

TITLE 5 PART II CHAPTER 12 SUBCHAPTER III
Sec. 1221.

Sec. 1221. - Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)

> **(1)** Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.
>
> **(2)** Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.
>
> **(3)**
>
> > **(A)** The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.
> >
> > **(B)** Except as provided in subparagraph (C), a stay granted under this subsection shall remain

in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(d)

(1) **At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.**

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that -

(A) **the official taking the personnel action knew of the disclosure; and**

(B) **the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.**

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(f)

(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.

(g)

(1)

(A) If the Board orders corrective action under this section, **such corrective action may include -**

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former employee, [1] or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, **regardless of the basis of the decision.**

(h)

(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

(j) **In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account**

---

[1] So in original. Probably should be "employee,"

TITLE 5 PART III Subpart A CHAPTER 23 Sec. 2302.

Sec. 2302. - Prohibited personnel practices

(a)

(1) For the purpose of this title, **"prohibited personnel practice" means any action described in subsection (b).**

(2) For the purpose of this section -

(A) "personnel action" means -

(i) an appointment;

(ii) a promotion;

(iii) **an action under chapter 75 of this title or other disciplinary or corrective action;**

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) **a decision to order psychiatric testing or examination; and**

(xi) **any other significant change in duties, responsibilities, or working conditions**;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, **any position in the competitive service,** a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action -

> **(i)** excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
>
> **(ii)** excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; and

(C) "agency" means an Executive agency and the Government Printing Office, but does not include -

> **(i)** a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8);
>
> **(ii)** the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) **Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority** -

(1) discriminate for or against any employee or applicant for employment -

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of -

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) **deceive or willfully obstruct any person with respect to such person's right to compete for employment**;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) **take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of -**

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority,

or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of -

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)

(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or **the taking of any personnel action against an employee who discloses information to the Congress.**

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under -

> **(1)** section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;
>
> **(2)** sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;
>
> **(3)** under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;
>
> **(4)** section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or
>
> **(5)** the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)

> **(1)** **For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law**:
>
> > **(A)** Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and **4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.**

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) **Sections 106(f), 7281(e), and 7802(5) of title 38.**

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action)

TITLE 5 PART III Subpart F CHAPTER 77 Sec. 7703.

Sec. 7703. - Judicial review of decisions of the Merit Systems Protection Board

(a)

(1) **Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision**.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action **or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.**

(b)

(1) Except as provided in paragraph (2) of this subsection, **a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit.** Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) **Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date**

the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals

TITLE 18 PART I CHAPTER 1 Sec. 24.

Sec. 24. - Definitions relating to Federal health care offense

(a) As used in this title, the term "Federal health care offense" means **a violation of, or a criminal conspiracy to violate** -

(1) section 669, **1035**, 1347, or 1518 of this title;

(2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 of this title, if the violation or conspiracy relates to a health care benefit program.

(b) **As used in this title, the term "health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit**, item, or service **for which payment may be made under the plan** or contract

TITLE 18 PART I CHAPTER 47 Sec. 1035.

Sec. 1035. - False statements relating to health care matters

(a) Whoever, in **any** matter involving a health care benefit program, **knowingly and willfully** -

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or

(2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section, the term "health care benefit program" has the meaning given such term in section 24(b) of this title

TITLE 18 PART II CHAPTER 211 Sec. 3231.

Sec. 3231. - District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof

TITLE 18 PART II CHAPTER 223 Sec. 3486.

Sec. 3486. - Administrative subpoenas

(a) Authorization. -

(1)

(A) In **any investigation** of -

(i)

(I) a Federal health care offense; or

(II) a Federal offense involving the sexual exploitation or abuse of children, the Attorney General; or

(ii) an offense under section 871 or 879, or a threat against a person protected by the United States Secret Service under paragraph (5) or (6) of section 3056, [1] if the Director of the Secret Service determines that the threat constituting the offense or the threat against the person protected is imminent, the Secretary of the Treasury, "3056(a),". may issue in writing and cause to be served a subpoena requiring the production and testimony described in subparagraph (B).

(B) Except as provided in subparagraph (C), a subpoena issued under subparagraph (A) may require -

(i) the production of any records or other things relevant to the investigation; and

(ii) testimony by the custodian of the things required to be produced concerning the production and **authenticity** of those things.

(C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond -

(i) requiring that provider to disclose the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of such service and the types of services the subscriber or customer utilized, which may be relevant to an authorized law enforcement inquiry; or

(ii) requiring a custodian of the records of that provider to give testimony concerning the production and authentication of such records or information.

(D) As used in this paragraph, the term "Federal offense involving the sexual exploitation or abuse of children" means an offense under section 1201, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, in which the victim is an individual who has not attained the age of 18 years.

(2) A subpoena under this subsection shall describe the objects required to be produced and prescribe a return date within a reasonable period of time within which the objects can be assembled and made available.

(3) The production of records relating to a Federal health care offense shall not be required under this section at any place more than 500 miles distant from the place where the subpoena for the production of such records is served. The production of things in any other case may be required from any place within the

United States or subject to the laws or jurisdiction of the United States.

(4) Witnesses subpoenaed under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(5) At any time before the return date specified in the summons, the person or entity summoned may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the summons, or a prohibition of disclosure ordered by a court under paragraph (6).

(6)

> **(A)** A United State [2] district court for the district in which the summons is or will be served, upon application of the United States, may issue an ex parte order that no person or entity disclose to any other person or entity (other than to an attorney in order to obtain legal advice) the existence of such summons for a period of up to 90 days.
>
> **(B)** Such order may be issued on a showing that the things being sought may be relevant to the investigation and there is reason to believe that such disclosure may result in -
>
> > **(i)** endangerment to the life or physical safety of any person;
> >
> > **(ii)** flight to avoid prosecution;
> >
> > **(iii)** destruction of or tampering with evidence; or
> >
> > **(iv)** intimidation of potential witnesses.
>
> **(C)** An order under this paragraph may be renewed for additional periods of up to 90 days upon a showing that the circumstances described in subparagraph (B) continue to exist.

(7) A summons issued under this section shall not require the production of anything that would be protected from production under the standards applicable to a subpoena duces tecum issued by a court of the United States.

(8) If no case or proceeding arises from the production of records or other things pursuant to this section within a reasonable time after those records or things are produced, the agency to which those records or things were delivered shall, upon written demand made by the person producing those records or things, return them to that person, except where the production required was only of copies rather than originals.

(9) A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(ii) may require production as soon as possible, but in no event less than 24 hours after service of the subpoena.

(10) As soon as practicable following the issuance of a subpoena under paragraph (1)(A)(ii), the Secretary of the Treasury shall notify the Attorney General of its issuance.

(b) Service. - A subpoena issued under this section may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it. Service upon a natural person may be made by personal delivery of the subpoena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

(c) Enforcement. - In the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpoena. The court may issue an order requiring the subpoenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony concerning the production and authentication of such records. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

(d) Immunity From Civil Liability. - Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer.

(e) Limitation on Use. -

(1) Health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health; or if authorized by an appropriate order of a court of competent jurisdiction, granted after application showing good cause therefore.

(2) In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.

(3) Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure

---

[1] So in original. Probably should be section

[2] So in original.

TITLE 28 PART IV CHAPTER 81 Sec. 1253.

Sec. 1253. - Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges

TITLE 28 PART IV CHAPTER 85 Sec. 1346.

Sec. 1346. - United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United

States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) **Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title Sec. 1346. - United States as defendant**

28 U.S.C. Section 2101(e)

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

TITLE 28 PART VI CHAPTER 171 Sec. 2674.

Sec. 2674. - Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity **which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim**, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter

TITLE 28 PART VI CHAPTER 171 Sec. 2679.

Sec. 2679. - Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases **shall be exclusive.**

(b)

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting **within the scope** of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) **Paragraph (1) does not extend or apply to a civil action against an employee of the Government** -

(A) **which is brought for a violation of the Constitution of the United States, or**

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) **Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.**

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, **such a claim shall be deemed to be timely presented under section 2401(b) of this title if -**

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect

TITLE 28 PART VI CHAPTER 179 Sec. 3904.

Sec. 3904. - Expedited review of certain appeals

(a) In General. - **An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of chapter 5 of title 3.**

(b) Jurisdiction. - The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in subsection (a), advance the appeal on the docket, and expedite the appeal to the greatest extent possible

TITLE 28 PART VI CHAPTER 179 Sec. 3905.

Sec. 3905. - Attorney's fees and interest

(a) Attorney's Fees. - **If a covered employee, with respect to any claim under chapter 5 of title 3,** or a qualified person with a disability, with respect to any claim under section 421 of title 3, **is a prevailing party in any proceeding under section 1296 or section 1346(g), the court may award attorney's fees, expert fees, and any other costs as would be appropriate if awarded under section 706(k) of the Civil Rights Act of 1964.**

(b) Interest. - **In any proceeding under section 1296 or section 1346(g), the same interest to compensate for delay in payment shall be made available as would be appropriate if awarded under section 717(d) of the Civil Rights Act of 1964.**

(c) Punitive Damages. - Except as otherwise provided in chapter 5 of title 3, no punitive damages may be awarded with respect to any claim under chapter 5 of title 3.

TITLE 38 PART III CHAPTER 43

CHAPTER 43 - EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

Sec. 4301. - Purposes; sense of Congress

(a) The purposes of this chapter are -

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, **by providing for the prompt reemployment of such persons upon their completion of such service; and**

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter

Sec. 4302. - Relation to other law and plans or agreements

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter **that establishes a right or benefit that is more beneficial to, or is in addition to,** a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit

Sec. 4303. - Definitions

For the purposes of this chapter -

(1) The term "Attorney General" means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter.

(2) The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

(3) The term "employee" means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319(c) of this title.

(4)

(A) Except as provided in subparagraphs (B) and (C), **the term "employer" means** any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including -

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

(ii) **the Federal Government;**

(iii) a State;

(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

(B) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.

(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.

(5) **The term "Federal executive agency" includes** the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5, **and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.**

(6) **The term "Federal Government" includes any Federal executive agency, the legislative branch of**

the United States, and the judicial branch of the United States.

(7) The term "health plan" means an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(8) The term "notice" means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

(9) The term "qualified", with respect to an employment position, means having the ability to perform the essential tasks of the position.

(10) The term "reasonable efforts", in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.

(11) Notwithstanding section 101, the term "Secretary" means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.

(12) The term "seniority" means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.

(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active

duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.. [1]

(14) The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

(15) The term "undue hardship", in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of -

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the employer, including the composition,

structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

(16) The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard **when engaged in active duty for training, inactive duty training**, or full-time National Guard duty, the commissioned corps of the Public Health Service, **and any other category of persons designated by the President in time of war or national emergency**

Sec. 4304. - Character of service

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.

(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

(3) A dismissal of such person permitted under section 1161(a) of title 10.

(4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10

TITLE 38 PART III CHAPTER 43 SUBCHAPTER II

SUBCHAPTER II - EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

Sec. 4311. - Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person

- **(1)** has taken an action to enforce a protection afforded any person under this chapter,
- **(2)** has testified or otherwise made a statement in or in connection with any proceeding under this chapter,
- **(3)** has assisted or otherwise participated in an investigation under this chapter, or
- **(4)** has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited -

- **(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's

(A) action to enforce a protection afforded any person under this chapter,

(B) testimony or making of a statement in or in connection with any proceeding under this chapter,

(C) assistance or other participation in an investigation under this chapter, or

(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title

Sec. 4312. - Reemployment rights of persons who serve in the uniformed services

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if -

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment

with that employer by reason of service in the uniformed services does not exceed five years; and

(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service -

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is -

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10.

(d)

(1) An employer is not required to reemploy a person under this chapter if -

(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or

(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) In any proceeding involving an issue of whether -

(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,

(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,

the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

(e)

(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer -

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) **as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.**

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

(2)

(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

(f)

(1) **A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that -**

(A) **the person's application is timely**;

(B) **the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and**

(C) **the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304**.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)

(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

(h) **In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met**

Sec. 4313. - Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, **shall be promptly reemployed in a position of employment in accordance with the following order of priority:**

(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days -

(A) **in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by**

such service, the duties of which the person is qualified to perform; or

(B) **in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.**

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days -

(A) **in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or**

(B) **in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.**

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and **who (after reasonable efforts by the employer to accommodate the disability) is not qualified** due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service -

(A) **in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or**

(B) **if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.**

(4) In the case of a person who

(A) **is not qualified to be employed in**

(i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or

(ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and

(B) **cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.**

(b)

(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.

(2) **Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:**

(A) **Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.**

(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority

Sec. 4314. - Reemployment by the Federal Government

(a) Except as provided in subsections (b), (c), and (d), **if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.**

(b)

(1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall -

(A) **identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and**

(B) **ensure that the person is offered such position.**

(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that -

(A) **the Federal executive agency that employed the person referred to in such paragraph no longer exists** and the functions of such agency have not been transferred to another Federal executive agency; or

(B) **it is impossible or unreasonable for the agency to reemploy the person.**

(c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, **such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).**

(d) If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b)

Sec. 4315. - Reemployment by certain Federal agencies

(a) **The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.**

(b) **In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.**

(c)

> **(1)** The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.
>
> **(2)** Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.
>
> **(3)** A determination pursuant to this subsection shall not be subject to judicial review.

(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.

(d)

(1) Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.

(2) This section may not be construed -

(A) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, alternative employment in the Federal Government under this chapter, or information relating to the rights and obligations of employee and Federal agencies under this chapter; or

(B) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

(e) **The Director of the Office of Personnel Management shall ensure the offer of employment to a person in a position in a Federal executive agency on the basis described in subsection (b) if -**

(1) the person was an employee of an agency referred to in section 2302(a)(2)(C)(ii) of title 5 at the time the person entered the service from which the person seeks reemployment under this section;

(2) the appropriate officer of the agency determines under subsection (c) that reemployment of the person by the agency is impossible or unreasonable; and

(3) **the person submits an application to the Director for an offer of employment under this subsection**

Sec. 4316. - Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b)

(1) Subject to paragraphs (2) through (6), **a person who is absent from a position of employment by reason of service in the uniformed services shall be -**

(A) **deemed to be on furlough or leave of absence while performing such service; and**

(B) **entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of**

absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2)

(A) Subject to subparagraph (B), a person who -

(i) is absent from a position of employment by reason of service in the uniformed services, and

(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,

is not entitled to rights and benefits under paragraph (1)(B).

(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) **Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.**

(5) **The entitlement of a person to coverage under a health plan is provided for under section 4317.**

(6) **The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.**

(c) **A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause -**

(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

(d) **Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.**

(e)

(1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(2) **For purposes of section 4312(e)(1) of this title, an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment**

Sec. 4317. - Health plans

(a)

(1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, the plan shall provide that the person may elect to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of -

(A) the 18-month period beginning on the date on which the person's absence begins; or

(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e).

(2) A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated -

(A) by the plan in such manner as the plan sponsor shall provide; or

(B) if the sponsor does not provide -

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(b)

(1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.

(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services

Sec. 4318. - Employee pension benefit plans

(a)

(1)

(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of

1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2)

(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)

(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated -

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide -

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed -

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan

Sec. 4319. - Employment and reemployment rights in foreign countries

(a) Liability of Controlling United States Employer of Foreign Entity. - If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.

(b) Inapplicability to Foreign Employer. - This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by a United States employer.

(c) Determination of Controlling Employer. - For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.

(d) Exemption. - Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.

TITLE 38 PART III CHAPTER 43 SUBCHAPTER III

SUBCHAPTER III - PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND INVESTIGATION

Sec. 4321. - Assistance in obtaining reemployment or other employment rights or benefits

The Secretary (through the Veterans' Employment and Training Service) shall provide assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under this chapter. In providing such assistance, the Secretary may request the assistance of existing Federal and State agencies engaged in similar or related activities and utilize the assistance of volunteers

Sec. 4322. - Enforcement of employment or reemployment rights

(a) A person who claims that -

> **(1)** **such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by an employer; and**
>
> **(2)**
>
> > **(A)** **such employer has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter; or**
> >
> > **(B)** **in the case that the employer is a Federal executive agency, such employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter**,
>
> may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint.

(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.

(c) The Secretary shall, upon request, provide technical assistance to a potential claimant with respect to a complaint under this subsection, and when appropriate, to such claimant's employer.

(d) The Secretary shall investigate each complaint submitted pursuant to subsection (a). If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter.

(e) If the efforts of the Secretary with respect to any complaint filed under subsection (a) do not resolve the complaint, the Secretary shall notify the person who submitted the complaint of -

(1) the results of the Secretary's investigation; and

(2) the complainant's entitlement to proceed under the enforcement of rights provisions provided under section 4323 (in the case of a person submitting a complaint against a State or private employer) or section 4324 (in the case of a person submitting a complaint against a Federal executive agency or the Office of Personnel Management).

(f) This subchapter does not apply to any action relating to benefits to be provided under the Thrift Savings Plan under title 5

Sec. 4323. - Enforcement of rights with respect to a State or private employer

(a) Action for Relief. -

(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person -

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(b) Jurisdiction. -

(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) Venue. -

(1) **In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.**

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) Remedies. -

(1) In any action under this section, the court may award relief as follows:

> **(A) The court may require the employer to comply with the provisions of this chapter.**
>
> **(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.**
>
> **(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.**

(2)

> **(A)** Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
>
> **(B)** In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity Powers. - The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

(f) Standing. - An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

(g) Respondent. - In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) Fees, Court Costs. -

(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) Inapplicability of State Statute of Limitations. - No State statute of limitations shall apply to any proceeding under this chapter.

(j) Definition. - In this section, the term "private employer" includes a political subdivision of a State.

Sec. 4324. - Enforcement of rights with respect to Federal executive agencies

(a)

(1) A person who receives from the Secretary a notification pursuant to section 4322(e) **may request**

that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person **and initiate an action regarding such complaint before the Merit Systems Protection Board.**

(B) If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

(b) **A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person -**

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) **has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).**

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)

(1) **A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.**

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel **unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision**

Sec. 4325. - Enforcement of rights with respect to certain Federal agencies

(a) This section applies to any person who alleges that -

(1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or

(2) **the failure of such agency to reemploy the person under such section was otherwise wrongful**.

(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.

(c) In prescribing procedures for the investigation and resolution of allegations under subsection (b), the head of an agency shall ensure, to the maximum extent practicable, that the procedures are similar to the procedures for investigating and resolving complaints utilized by the Secretary under section 4322(d).

(d) **This section may not be construed** -

(1) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter or information relating to the rights and obligations of employees and Federal agencies under this chapter; or

(2) **as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of**

clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter

Sec. 4326. - Conduct of investigation; subpoenas

(a) In carrying out any investigation under this chapter, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to and the right to interview persons with information relevant to the investigation and shall have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or employer that the Secretary considers relevant to the investigation.

(b) In carrying out any investigation under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

(c) **Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.**

(d) Subsections (b) and (c) shall not apply to the legislative branch or the judicial branch of the United States

SUBCHAPTER IV - MISCELLANEOUS PROVISIONS

Sec. 4331. - Regulations

(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

(b)

(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

(2) The following entities may prescribe regulations to carry out the activities of such entities under this chapter:

(A) The Merit Systems Protection Board.

(B) The Office of Special Counsel.

(C) The agencies referred to in section 2303(a)(2)(C)(ii) [1] So in original. Probably should be section "2302(a)(2)(C)(ii)"

---

[1] of title 5.

Sec. 4332. - Reports

The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 4324(a)(1) and no later than February 1, 1996, and annually thereafter through 2000, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:

(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.

(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.

(3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.

(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).

(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment

Sec. 4333. - Outreach

The Secretary, the Secretary of Defense, and the Secretary of Veterans Affairs shall take such actions as such Secretaries determine are appropriate to inform persons entitled to rights and benefits under this chapter and employers of the rights, benefits, and obligations of such persons and such employers under this chapter

H.R. 169

Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Enrolled as Agreed to or Passed by Both House and Senate)

One Hundred Seventh Congress
Of the
United States of America
AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday, the twenty-third day of January, two thousand and two

An Act

To require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws; to require that each Federal agency post quarterly on its public Web site, certain statistical data relating to Federal sector equal employment opportunity complaints filed with such agency; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE- This Act may be cited as the 'Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002'.

(b) TABLE OF CONTENTS- The table of contents of this Act is as follows;

Sec 1. Short title; table of contents.

TITLE I – GENERAL PROVISIONS

Sec. 101. Findings.
Sec. 102. Sense of Congress.
Sec 103. Definitions.
Sec. 104. Effective date.

TITLE II FEDERAL EMPLOYEE DISCRIMINATION AND RETALIATION

Sec. 201. Reimbursement requirement.

Sec. 202. notification requirement.

Sec. 203. Reporting requirement.

Sec. 204. Rules and guidelines.

Sec. 205. Clarification of remedies.

Sec. 206. Studies by General Accounting Office on exhaustion of remedies and certain Department of Justice costs.

TITLE III –EQUAL EMPLOYNMENT OPPORTUNITY COMPLAINT DATA DISCLOSURE

Sec. 301. Data to be posted by employing Federal agencies.

Sec. 302. Data to be posted by the Equal Employment Opportunity Commission.

Sec. 303. Rules.

TITLE I – GENERAL PROVISIONS

SEC. 101. FINDINGS.

Congress finds that—

(1) Federal agencies cannot be run effectively if those agencies practice or tolerate discrimination;

(2) Congress has heard testimony from individuals, including representatives of the National Association for the Advancement of Colored People and the American Federation of Government Employees, that point to chronic problems of discrimination and retaliation against Federal employees;

(3) in August 2000, a jury found that the Environmental Protection Agency had discriminated against a senior social scientist, and awarded that scientist $600,000;

(4) in October 2000, an Occupational Safety and Health Administration investigation found that the Environmental Protection Agency had retaliated against a

senior scientist for disagreeing with that agency on a matter of science and for helping Congress to carry out its oversight responsibilities;

(5) there have been several recent class action suits based on discrimination brought against Federal agencies, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the Immigration and Naturalization Service, the United States Marshals Service, the Department of Agriculture, the United States Information Agency, and the Social Security Administration;

(6) notifying Federal employees of their rights under discrimination and whistleblower laws should increase Federal agency compliance with the law;

(7) requiring annual reports to Congress on the number and severity of discrimination and whistleblower cases brought against each Federal agency should enable Congress to improve its oversight over compliance by agencies with the law; and

(8) requiring Federal agencies to pay for any discrimination or whistleblower judgment, award, or settlement should improve agency accountability with respect to discrimination and whistleblower laws.

SEC. 102. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) Federal agencies should not retaliate for court judgments or settlements relating to discrimination and whistleblower laws by targeting the claimant or other employees with reductions in compensation, benefits, or workforce to pay for such judgments or settlements;

(2) the mission of the Federal agency and the employment security of employees who are blameless in a whistleblower incident should not be compromised;

(3) Federal agencies should not use a reduction in force or furloughs as means of funding a reimbursement under this Act;

(4) (A) accountability in the enforcement of employee rights is not furthered by terminating—

(i) the employment of other employees; or

(ii) the benefits to which those employees are entitled through statute or contract; and

(B) this Act is not intended to authorize those actions;

(5)(A) nor is accountability furthered if Federal agencies react to the increased accountability under this Act by taking unfounded disciplinary actions against managers or by violating the procedural rights of managers who have been accused of discrimination; and

(B) Federal agencies should ensure that managers have adequate training in the management of a diverse workforce and in dispute resolution and other essential communication skills; and

(6)(A) Federal agencies are expected to reimburse the General Fund of the Treasury within a reasonable time under this Act; and

(B) a Federal agency, particularly in the amount of reimbursement under this Act is large relative to annual appropriations for that agency, may need to extend reimbursement over several years in order to avoid—

(i) reductions in force;

(ii) furloughs;

(iii) other reductions in compensation or benefits for the workforce of the agency; or

(iv) an adverse effect on the mission of the agency.

SEC. 103. DEFINITIONS.

For purposes of this Act—

(1) the term 'applicant for Federal employment' means an individual applying for employment in or under a Federal agency;

(2) the term 'basis of alleged discrimination' shall have the meaning given such term under section 303;

(3) the term 'Federal agency' means an Executive agency (as defined in section 105 of title 5, United States Code), the United States Postal Service, or the Postal Rate Commission;

(4) the term 'Federal employee; means an individual employed in or under a Federal agency;

(5) the term 'former Federal employee' means an individual formerly employed in or under a Federal agency; and

(6) the term 'issue of alleged discrimination; shall have the meaning given such term under section 303.

SEC. 104. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the 1st day of the 1st fiscal year beginning more than 180 days after the date of the enactment of this Act.

TITLE II – FEDERAL EMPLOYEE DISCRIMINATION AND RETALIATION

SEC. 201. 201. REIMBURSEMENT REQUIREMENT.

(a) APPLICABILITY – This section applies with respect to any payment made in accordance with section 2414, 2517, 2672, or 2677 of 2414, 2517, 2672, or 2677 of title 28, United States Code, and under section 1304 of title 31, United States Code (relating to judgments, awards, and compromise settlements) to any Federal employee, former Federal employee, or applicant for Federal employment, in connection with any proceeding brought by or on behalf of such employee, former employee, or applicant under --

(1) any provision of law cited in subsection (c); or

(2) any other provision of law which prohibits any form of discrimination, as identified under rules issued under section 204.

(b) REQUIREMENT – An amount equal to the amount of each payment described in subsection (a) shall be reimbursed to the fund described in section 1304 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, of such fund, or of such account available for the enforcement of any Federal law) available for operating expenses of the Federal agency to which the discriminatory conduct involved is attributable as determined under section 204.

(c) SCOPE- The provisions of law cited in this subsection are the following:

(1) Section 2302(b) of title 5, United States Code, as applied to discriminatory conduct described in paragraphs (1) and (8), or described in paragraph (9) of such section as applied to discriminatory conduct described in paragraphs (1) and (8), of such section.

(2) The provisions of law specified in section 2302(d) of title 5, United States Code.

SEC. 202. NOTIFICATION REQUIREMENT.

(a) IN GENERAL- Written notification of the rights and protections available to Federal employees, former Federal employees, and applicants for Federal employment (as the case may be) in connection with the respective provisions of law covered by paragraphs (1) and (2) of section 201(a) shall be provided to such employees, former employees, and applicants--

(1) in accordance with otherwise applicable provisions of law; or

(2) if, or to the extend that, no such notification would otherwise be required, in such time, form, and manner as shall under section 204 be required in order to carry out the requirements of this section.

(b) POSTING ON THE INTERNET Any written notification under this section shall include, but not be limited to, the posting of the information required under paragraph (1) or (2) (as applicable) of subsection (a) on the Internet site of the Federal agency involved.

(c) EMPLOYEE TRAINING- Each Federal agency shall provide to the employees of such agency training regarding the rights and remedies applicable to such employees under the laws cited in section 201(c).

SEC. 203. REPORTING REQUIREMENT.

(a) ANNUAL REPORT- Subject to subsection (b), not later than 180 days after the end of each fiscal year, each Federal agency shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Committee on Governmental Affairs of the Senate, the Committee on Government Reform of the House of Representatives, each committee of Congress with jurisdiction relating to the agency, the Equal Employment Opportunity Commission, and the Attorney General an annual report which shall include, with respect to the fiscal year--

(1) the number of cases arising under each of the respective provisions of law covered by paragraphs (1) and (2) of section 201 (a) in which discrimination on the part of such agency was alleged:

(2) the status or disposition of cases described in paragraph (1);

(3) the amount of money required to be reimbursed by such agency under section 201 in connection with each of such cases, separately identifying the aggregate amount of such cases, separately identifying the aggregate amount of such reimbursements attributable to the payment of attorney's fees, if any;

(4) the number of employees disciplined for discrimination, retaliation, harassment, or any other infraction of any provision of law referred to in paragraph (1);

(5) the final year-end data posted under section 301(c)(1)(B) for such fiscal year (without regard to section 301(c)(2));

(6) a detailed description of –

(A) the policy implemented by that agency relating to appropriate disciplinary actions against a Federal employee who—

(i) discriminated against any individual in violation of any of the laws cited under section 201(a)(1) or (2); and

(ii) committed another prohibited personnel practice that was revealed in the investigation of a complaint alleging a violation of any of the laws cited under section 201(a) (1) or (2); and

(B) with respect to each of such laws, the number of employees who are disciplined in accordance with such policy and the specific nature of the disciplinary action taken;

(7) an analysis of the information descried under paragraphs (1) through (6) (in conjunction with data provided to the Equal Employment Opportunity Commission in compliance with part 1614 of title 29 of the Code of Federal Regulations) including—

(A) an examination of trends;

(B) causal analysis;

(C) practical knowledge gained through experience; and

(D) any actions planned or taken to improve complaint or civil rights programs of the agency; and

(8) any adjustment (to the extend the adjustment can be ascertained in the budget of the agency) to comply with the requirements under section 201.

(b) FIRST REPORT- The 1st report submitted under subsection (a) shall include for each item under subsection (a) data for each of the 5 immediately preceding fiscal years (or, if data are not available for all 5 fiscal years, for each of those 5 fiscal years for which data are available).

SEC. 204. RULES AND GUIDELINES.

(a) ISSUANCE OF RULES AND GUIDELINES- The President (or the designee of the President) shall issue-

(1) rules to carry out this title;

(2) rules to require that a comprehensive study be conducted in the executive branch to determine the best practices relating to the appropriate disciplinary actions against Federal employees who commit the actions described under clauses (i) and (ii) of section 203 (a)(6)(A); and

(3) based on the results of such study, advisory guidelines incorporating best practices that Federal agencies may follow to take such actions against such employees.

(b) AGENCY NOTIFICATION REGARDING IMPLEMENTATION OF GUIDELINES- Not later than 30 days after the issuance of guidelines under subsection (a), each Federal agency shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Equal Employment Opportunity Commission, and the Attorney General a written statement specifying in detail—

(1) whether such agency has adopted and will fully follow such guidelines;

(2) if such agency has not adopted such guidelines; the reasons for the failure to adopt such guidelines; and

(3) if such agency will not fully follow such guidelines, the reasons for the decision not to fully follow such guidelines and an explanation of the extent to which such agency will not follow such guidelines.

SEC. 205. CLARIFICATION OF REMEDIES.

Consistent with Federal law, nothing in this title shall prevent any Federal employee, former Federal employee, or applicant for Federal employment from exercising any right otherwise available under the laws of the United States.

SEC 206. STUDIES BY GENERAL ACCOUNTING OFFICE ON EXHAUSTION OF ADMINISTRATIVE REMEDIES AND ON ASCERTAINMENT OF CERTAIN DEPARTMENT OF JUSTICE COSTS.

(a) STUDY ON EXHAUSTION OF ADMINISTRATIVE REMEDIES-

(1) STUDY-

(A) IN GENERAL- Not later than 180 days after the date of enactment of this Act, the General Accounting Office shall conduct a study relating to the effects of eliminating the requirement that Federal employees aggrieved by violations of any of the laws specified under section 201(c) exhaust administrative remedies before filing complaints with the Equal Employment Opportunity Commission.

(B) CONTENTS- The study shall include a detailed summary of matters investigated, information collected, and conclusions formulated that lead to determinations of how the elimination of such requirement will—

(i) expedite handling of allegations of such violations within Federal agencies and will streamline the complaint-filing process;

(ii) affect the workload of the Commission;

(iii) affect established alternative dispute resolution procedures in such agencies; and

(iv) affect any other matters determined by the General Accounting Office to be appropriate for consideration.

(2) REPORT – Not later than 90 days after completion of the study required by paragraph (1), the General Accounting Office shall submit to the Speaker of the

House of Representatives, the President pro tempore of the Senate, the Equal Employment Opportunity Commission, and the Attorney General a report containing the information required to be included in such study.

(b) STUDY ON ASCERTAINMENT OF CERTAIN COSTS OF THE DEPARTMENT OF JUSTICE IN DEFENDING DISCRIMINATION AND WHISTLEBLOWER CASES-

(1) STUDY- Not later than 180 days after the date of enactment of this Act, the General Accounting Office shall conduct a study of the methods that could be used for, and the extend of ay administrative burden that would be imposed on, the Department of Justice to ascertain the personnel and administrative costs incurred in defending in each case arising from a proceeding identified under section 201(a)(1) and (2).

(2) REPORT- Not later than 90 days after completion of the study required by paragraph (1), the General Accounting Office shall submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report containing the information required to be included in the study.

(c) STUDIES ON STATUTORY EFFECTS ON AGENCY OPERATIONS-

(1) IN GENERAL – Not later than 18 months after the date of enactment of this Act, the General Accounting Office shall conduct—

(A) a study on the effects of section 201 on the operations of Federal agencies; and

(B) a study on the effects of section 13 of the Contract Disputes Act of 1978 (41 U.S.C. 612) on the operations of Federal agencies.

(2) CONTENTS – Each study under paragraph (1) shall include, with respect to the applicable statutes of the study—

(A) a summary of the number of cases in which a payment was made in accordance with section 2414, 2517, 2672, or 2677 of title 28, United States Code and under section 1304 of title 31, United States Code;

(B) a summary of the length of time Federal agencies used to complete reimbursements of payments described under subparagraph (A); and

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

(Public Law 104-191 104th Congress)

TITLE II--PREVENTING HEALTH CARE FRAUD AND ABUSE; ADMINISTRATIVE SIMPLIFICATION

- Sec. 200. References in title.
- **Subtitle A--Fraud and Abuse Control Program**
    - **Sec. 201. Fraud and abuse control program.**
    - Sec. 202. Medicare integrity program.
    - Sec. 203. Beneficiary incentive programs.
    - **Sec. 204. Application of certain health antifraud and abuse sanctions to fraud and abuse against Federal health care programs.**
    - Sec. 205. Guidance regarding application of health care fraud and abuse sanctions.
- Subtitle B--Revisions to Current Sanctions for Fraud and Abuse
    - Sec. 211. Mandatory exclusion from participation in Medicare and State health care programs.
    - Sec. 212. Establishment of minimum period of exclusion for certain individuals and entities subject to permissive exclusion from Medicare and State health care programs.
    - Sec. 213. Permissive exclusion of individuals with ownership or control interest in sanctioned entities.
    - Sec. 214. Sanctions against practitioners and persons for failure to comply with statutory obligations.
    - Sec. 215. Intermediate sanctions for Medicare health maintenance organizations.

  - Sec. 216. Additional exception to anti-kickback penalties for risk- sharing arrangements.
  - Sec. 217. Criminal penalty for fraudulent disposition of assets in order to obtain Medicaid benefits.
  - Sec. 218. Effective date.
- Subtitle C--Data Collection
  - **Sec. 221. Establishment of the health care fraud and abuse data collection program.**
  - Subtitle D--Civil Monetary Penalties
  - Sec. 231. Social Security Act civil monetary penalties.
  - Sec. 232. Penalty for false certification for home health services.
- **Subtitle E--Revisions to Criminal Law**
  - Sec. 241. Definitions relating to Federal health care offense.
  - **Sec. 242. Health care fraud.**
  - Sec. 243. Theft or embezzlement.
  - **Sec. 244. False statements.**
  - Sec. 245. Obstruction of criminal investigations of health care offenses.
  - Sec. 246. Laundering of monetary instruments.
  - Sec. 247. Injunctive relief relating to health care offenses.
  - **Sec. 248. Authorized investigative demand procedures.**
  - Sec. 249. Forfeitures for Federal health care offenses.
  - Sec. 250. Relation to ERISA authority.
- **Subtitle F--Administrative Simplification**
  - **Sec. 261. Purpose.**

- **Sec. 262. Administrative simplification.**

- **Part C--Administrative Simplification**
- Sec. 1171. Definitions.
- Sec. 1172. General requirements for adoption of standards.
- **Sec. 1173. Standards for information transactions and data elements.**
- Sec. 1174. Timetables for adoption of standards.
- **Sec. 1175. Requirements.**
- **Sec. 1176. General penalty for failure to comply with requirements and standards.**
- **Sec. 1177. Wrongful disclosure of individually identifiable health information.**
- Sec. 1178. Effect on State law.
- Sec. 1179. Processing payment transactions.".
- Sec. 263. Changes in membership and duties of National Committee on Vital and Health Statistics.
- **Sec. 264. Recommendations with respect to privacy of certain health information.**
- Subtitle G--Duplication and Coordination of Medicare-Related Plans
- Sec. 271. Duplication and coordination of Medicare-related plans.

SEC. 200. REFERENCES IN TITLE.

Except as otherwise specifically provided, whenever in this title an amendment is expressed in terms of an amendment to or repeal of a section or other provision, the reference shall be considered to be made to that section or other provision of the Social Security Act.

Subtitle A--Fraud and Abuse Control Program

SEC. 201. FRAUD AND ABUSE CONTROL PROGRAM.

(a) Establishment of Program.--Title XI (42 U.S.C. 1301 et seq.) is amended by inserting after section 1128B the following new section:

Sec. 1128C. (a) (NOTE: 42 USC 1320a-7c.) Establishment of Program.-- (1) In general.--Not later than January 1, 1997, the Secretary, acting through the Office of the Inspector General of the Department of Health and Human Services, and the Attorney General shall establish a program-- (A) to coordinate Federal, State, and local law enforcement programs **to control fraud and abuse with respect to health plans,** (B) **to conduct investigations, audits, evaluations, and inspections relating to the delivery of and payment for health care in the United States**, (C) to facilitate the enforcement of the provisions of sections 1128, 1128A, and 1128B and other statutes applicable **to health care fraud and abuse**, (D) to provide for the modification and establishment of safe harbors and to issue advisory opinions and special fraud alerts pursuant to section 1128D, and (E) to provide for the reporting and disclosure of certain final adverse actions against health care providers, suppliers, or practitioners pursuant to the data collection system established under section 1128E.

(2) **Coordination with health plans.--In carrying out the program established under paragraph (1), the Secretary and the Attorney General shall consult with, and arrange for the sharing of data with representatives of health plans.**

(3) Guidelines.-- (A) In general.--The Secretary and the Attorney General shall issue guidelines to carry out the program under paragraph (1). The provisions of sections 553, 556, and 557 of title 5, United States Code, shall not apply in the issuance of such guidelines.

(B) Information guidelines.-- (i) In general.--Such guidelines shall include guidelines relating to the furnishing of information by health plans, providers, and others to enable the Secretary and the Attorney General to carry out the program (including coordination with health plans under paragraph (2)).

(ii) **Confidentiality.--Such guidelines shall include procedures to assure that such information is provided and utilized in a manner that appropriately protects the confidentiality of the information and the privacy of individuals receiving health care services and items**.

(iii) Qualified immunity for providing information.--The provisions of section 1157(a) (relating to limitation on liability) shall apply to a person providing information to the Secretary or the Attorney General in conjunction with their performance of duties under this section.

(4) Ensuring access to documentation.--The Inspector General of the Department of Health and Human Services is authorized to exercise such authority described in paragraphs (3) through (9) of section 6 of the Inspector General Act of 1978 (5 U.S.C. App.) as necessary **with respect to the activities under the fraud and abuse control program established under this subsection.**

(5) Authority of inspector general.--Nothing in this Act shall be construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978 (5 U.S.C. App.).

(b) Additional Use of Funds by Inspector General.-- (1) Reimbursements for investigations.--The Inspector General of the Department of Health and Human Services is authorized to receive and retain for current use reimbursement for the costs of conducting investigations and audits and for monitoring compliance plans when such costs are ordered by a court, voluntarily agreed to by the payor, or otherwise.

(2) Crediting.--Funds received by the Inspector General under paragraph (1) as reimbursement for costs of conducting investigations shall be deposited to the credit of the appropriation from which initially paid, or to appropriations

for similar purposes currently available at the time of deposit, and shall remain available for obligation for 1 year from the date of the deposit of such funds.

(c) **Health Plan Defined.**--**<u>For purposes of this section, the term `health plan' means a plan or program that provides health benefits, whether directly, through insurance, or otherwise, and includes-- (1) a policy of health insurance; (2) a contract of a service benefit organization; and (3) a membership agreement with a health maintenance organization or other prepaid health plan.".</u>**

(b) **Establishment of Health Care Fraud and Abuse Control Account in Federal Hospital Insurance Trust Fund**.--Section 1817 (42 U.S.C. 1395i) is amended by adding at the end the following new subsection: (k) Health Care Fraud and Abuse Control Account.-- (1) Establishment.-- There is hereby established in the Trust Fund an expenditure account to be known as the `Health Care Fraud and Abuse Control Account' (in this subsection referred to as the `Account').

(2) Appropriated amounts to trust fund.-- (A) In general.-- There are hereby appropriated to the Trust Fund-- (i) such gifts and bequests as may be made as provided in subparagraph (B); (ii) such amounts as may be deposited in the Trust Fund as provided in sections 242(b) and 249(c) of the Health Insurance Portability and Accountability Act of 1996, and title XI; and (iii) such amounts as are transferred to the Trust Fund under subparagraph (C).

(B) Authorization to accept gifts.--The Trust Fund is authorized to accept on behalf of the United States money gifts and bequests made unconditionally to the Trust Fund, for the benefit of the Account or any activity financed through the Account.

(C) Transfer of amounts.--The Managing Trustee shall transfer to the Trust Fund, under rules similar to the rules in section 9601 of the Internal Revenue Code of 1986, an amount equal to the sum of the following: (i) Criminal fines recovered in cases involving a Federal health care offense (as defined in section 982(a)(6)(B) of title 18, United States Code).

(ii) Civil monetary penalties and assessments imposed in health care cases, including amounts recovered under titles XI, XVIII, and XIX, and chapter 38 of title 31, United States Code (except as otherwise provided by law).

(iii) Amounts resulting from the forfeiture of property by reason of a Federal health care offense.

(iv) Penalties and damages obtained and otherwise creditable to miscellaneous receipts of the general fund of the Treasury obtained under sections 3729 through 3733 of title 31, United States Code (known as the **False Claims Act**), in cases involving claims related to the provision of health care items and services (other than funds awarded to a realtor, for restitution or otherwise authorized by law).

(D) Application.--Nothing in subparagraph (C)(iii) shall be construed to limit the availability of recoveries and forfeitures obtained under title I of the Employee Retirement Income Security Act of 1974 for the purpose of providing equitable or remedial relief for employee welfare benefit plans, and for participants and beneficiaries under such plans, as authorized under such title.

(3) **Appropriated amounts to account for fraud and abuse control program,** etc.-- (A) Departments of health and human services **and justice**.-- (i) In general.--There are hereby appropriated to the Account from the Trust Fund such sums as the Secretary and the Attorney General certify are necessary to carry out the purposes described in subparagraph (C), to be available without further appropriation, in an amount not to exceed-- (I) for fiscal year 1997, $104,000,000, (II) for each of the fiscal years 1998 through 2003, the limit for the preceding fiscal year, increased by 15 percent; and (III) for each fiscal year after fiscal year 2003, the limit for fiscal year 2003.

(ii) Medicare and Medicaid activities.--For each fiscal year, of the amount appropriated in clause (i), the following amounts shall be available only for the purposes of the activities of the Office of the Inspector General of the Department of Health and Human Services with respect to the Medicare and Medicaid programs-- (I) for fiscal year 1997, not less than $60,000,000 and not more than $70,000,000; (II) for fiscal year 1998, not less than $80,000,000 and not more than $90,000,000; (III) for fiscal year 1999, not less than $90,000,000 and not more than $100,000,000; (IV) for fiscal year 2000, not less than $110,000,000 and not more than $120,000,000; (V) for fiscal year 2001, not less than $120,000,000 and not more than $130,000,000; (VI) for fiscal year 2002, not less than $140,000,000 and not more than $150,000,000; and (VII) for each fiscal year after fiscal year 2002, not less than $150,000,000 and not more than $160,000,000.

(B) **Federal bureau of investigation**.--There are hereby appropriated from the general fund of the United States Treasury and hereby appropriated to the Account for transfer to the Federal Bureau of Investigation to carry out the purposes described in subparagraph (C), to be available without further appropriation-- (i) for fiscal year 1997, $47,000,000; (ii) for fiscal year 1998, $56,000,000; (iii) for fiscal year 1999, $66,000,000; (iv) for fiscal year 2000, $76,000,000; (v) for fiscal year 2001, $88,000,000; (vi) for fiscal year 2002, $101,000,000; and (vii) for each fiscal year after fiscal year 2002, $114,000,000.

(C) **Use of funds**.--The purposes described in this subparagraph are to cover the costs (including equipment, salaries and benefits, and travel and training) of the administration and operation of the health care **fraud and abuse control program** established under section 1128C(a), including the costs of-- (i) prosecuting health care matters (through criminal, civil, and administrative proceedings); (ii) investigations; (iii) financial and performance audits of health care programs and operations; (iv) inspections and other evaluations; and (v) provider and consumer education regarding compliance with the provisions of title XI.

(4) **Appropriated amounts to account for Medicare integrity program.**-- (A) In general.--There are hereby appropriated to the Account from the Trust Fund for each fiscal year such amounts as are necessary to carry out the Medicare Integrity Program under section 1893, subject to subparagraph (B) and to be available without further appropriation.

(B) **Amounts specified**.--The amount appropriated under subparagraph (A) for a fiscal year is as follows: (i) For fiscal year 1997, such amount shall be not less than $430,000,000 and not more than $440,000,000.

(ii) For fiscal year 1998, such amount shall be not less than $490,000,000 and not more than $500,000,000.

(iii) For fiscal year 1999, such amount shall be not less than $550,000,000 and not more than $560,000,000.

(iv) For fiscal year 2000, such amount shall be not less than $620,000,000 and not more than $630,000,000.

(v) For fiscal year 2001, such amount shall be not less than $670,000,000 and not more than $680,000,000.

(vi) For fiscal year 2002, such amount shall be not less than $690,000,000 and not more than $700,000,000.

(vii) For each fiscal year after fiscal year 2002, such amount shall be not less than $710,000,000 and not more than $720,000,000.

(5) Annual report.--Not later than January 1, the Secretary and the Attorney General shall submit jointly a report to Congress which identifies-- (A) the amounts appropriated to the Trust Fund for the previous fiscal year under paragraph (2)(A) and the source of such amounts; and (B) the amounts appropriated from the Trust Fund for such year under paragraph (3) and the justification for the expenditure of such amounts.

(6) GAO report.--Not later than January 1 of 2000, 2002, and 2004, the Comptroller General of the United States shall submit a report to Congress which-- (A) identifies-- (i) the amounts appropriated to the Trust Fund for the previous two fiscal years under paragraph (2)(A) and the source of such amounts; and (ii) the amounts appropriated from the Trust Fund for such fiscal years under paragraph (3) and the justification for the expenditure of such amounts; (B) identifies any expenditures from the Trust Fund with respect to activities not involving the Medicare program under title XVIII; (C) identifies any savings to the Trust Fund, and any other savings, resulting from expenditures from the Trust Fund; and (D) analyzes such other aspects of the operation of the Trust Fund as the Comptroller General of the United States considers appropriate.".

SEC. 202. MEDICARE INTEGRITY PROGRAM.

(a) Establishment of Medicare Integrity Program.--Title XVIII is amended by adding at the end the following new section:

Sec. 1893. (a) Establishment (NOTE: 42 USC 1395ddd.) of Program.--There is hereby established the Medicare Integrity Program (in this section referred to as the `Program') under which the Secretary shall promote the integrity of the Medicare program by entering into contracts in accordance with this section with eligible entities to carry out the activities described in subsection (b).

(b) Activities Described.--The activities described in this subsection are as follows: (1) Review of activities of providers of services or other individuals and entities furnishing items and services for which payment may be made under this title (including skilled nursing facilities and home health agencies), including medical and utilization review and fraud review (employing similar standards, processes, and technologies used by private health plans, including equipment and software technologies which surpass the capability of the equipment and technologies used in the review of claims under this title as of the date of the enactment of this section).

(2) Audit of cost reports.

(3) Determinations as to whether payment should not be, or should not have been, made under this title by reason of section 1862(b), **and recovery of payments that should not have been made.**

(4) Education of providers of services, beneficiaries, and other persons with respect to payment integrity and benefit quality assurance issues.

(5) Developing (and periodically updating) a list of items of durable medical equipment in accordance with section 1834(a)(15) which are subject to prior authorization under such section.

(c) Eligibility of Entities.--An entity is eligible to enter into a contract under the Program to carry out any of the activities described in subsection (b) if-- (1) the entity has demonstrated capability to carry out such activities; (2) in carrying out such activities, the entity agrees to cooperate with the Inspector General of the Department of Health and Human Services, the Attorney General, and other law enforcement agencies, as appropriate, in the investigation and deterrence of fraud and abuse in relation to this title and in other cases arising out of such activities; (3) the entity complies with such conflict of interest standards as are generally applicable to Federal acquisition and procurement; and (4) the entity meets such other requirements as the Secretary may impose.

In the case of the activity described in subsection (b)(5), an entity shall be deemed to be eligible to enter into a contract under the Program to carry out the activity if the entity is a carrier with a contract in effect under section 1842.

(d) Process (NOTE: Regulations.) for Entering Into Contracts.-- The Secretary shall enter into contracts under the Program in accordance with such procedures as the Secretary shall by regulation establish, except that such procedures shall include the following: (1) Procedures for identifying, evaluating, and resolving organizational conflicts of interest that are generally applicable to Federal acquisition and procurement.

(2) Competitive procedures to be used-- (A) when entering into new contracts under this section; (B) when entering into contracts that may result in the elimination of responsibilities of an individual fiscal intermediary or carrier under section 202(b) of the Health Insurance Portability and Accountability Act of 1996; and (C) at any other time considered appropriate by the Secretary, except that the Secretary may continue to contract with entities that are carrying out the activities described in this section pursuant to agreements under section 1816 or contracts under section 1842 in effect on the date of the enactment of this section.

(3) Procedures under which a contract under this section may be renewed without regard to any provision of law requiring competition if the contractor has met or exceeded the performance requirements established in the current contract.

The Secretary may enter into such contracts without regard to final rules having been promulgated.

(e) Limitation (NOTE: Regulations.) on Contractor Liability.-- The Secretary shall by regulation provide for the limitation of a contractor's liability for actions taken to carry out a contract under the Program, and such regulation shall, to the extent the Secretary finds appropriate, employ the same or comparable standards and other substantive and procedural provisions as are contained in section 1157.".

(b) Elimination of FI and Carrier Responsibility for Carrying Out Activities Subject to Program.-- (1) Responsibilities of fiscal intermediaries under part a.--Section 1816 (42 U.S.C. 1395h) is amended by adding at the end the following new subsection:

(l) No agency or organization may carry out (or receive payment for carrying out) any activity pursuant to an agreement under this section to the extent that the activity is carried out pursuant to a contract under the Medicare Integrity Program under section 1893.".

(2) Responsibilities of carriers under part b.--Section 1842(c) (42 U.S.C. 1395u(c)) is amended by adding at the end the following new paragraph:

(6) No carrier may carry out (or receive payment for carrying out) any activity pursuant to a contract under this subsection to the extent that the activity is carried out pursuant to a contract under the Medicare Integrity Program under section 1893. The previous sentence shall not apply with respect to the activity described in section 1893(b)(5) (relating to prior authorization of certain items of durable medical equipment under section 1834(a)(15)).".

SEC. 203. BENEFICIARY (NOTE: 42 USC 1395b-5.) INCENTIVE PROGRAMS.

(a) Clarification of Requirement to Provide Explanation of **Medicare** Benefits.--The Secretary of Health and Human Services (in this section referred to as the Secretary") shall provide an explanation of benefits under the **Medicare** program under title XVIII of the **Social Security Act with respect to each item or service for which payment may be made under the program which is furnished to an individual, without regard to whether or not a deductible or coinsurance may be imposed against the individual with respect to the item or service.**

(b) Program To Collect Information on **Fraud and Abuse**.--

(1) Establishment of program.--Not later than 3 months after the date of the enactment of this Act, the Secretary shall establish a program under which the Secretary shall encourage individuals to report to the Secretary information on individuals and entities who are engaging in or who have engaged in acts or omissions which constitute grounds for the imposition of a sanction under section 1128, 1128A, or 1128B of the Social Security Act, **or who have otherwise engaged in fraud and abuse against the Medicare**

program under title XVIII of such act for which there is a sanction provided under law. The program shall discourage provision of, and not consider, information which is frivolous or otherwise not relevant or material to the imposition of such a sanction.

(2) Payment of portion of amounts collected.--If an individual reports information to the Secretary under the program established under paragraph (1) which serves as the basis for the collection by the Secretary or the Attorney General of any amount of at least $100 (other than any amount paid as a penalty under section 1128B of the Social Security Act), the Secretary may pay a portion of the amount collected to the individual (under procedures similar to those applicable under section 7623 of the Internal Revenue Code of 1986 to payments to individuals providing information on violations of such Code).

(c) Program To Collect Information on Program Efficiency.--

(1) Establishment of program.--Not later than 3 months after the date of the enactment of this Act, the Secretary shall establish a program under which the Secretary shall encourage individuals to submit to the Secretary suggestions on methods to improve the efficiency of the **Medicare** program.

(2) Payment of portion of program savings.--If an individual submits a suggestion to the Secretary under the program established under paragraph (1) which is adopted by the Secretary and which results in savings to the program, the Secretary may make a payment to the individual of such amount as the Secretary considers appropriate.

SEC. 204. APPLICATION OF CERTAIN HEALTH ANTIFRAUD AND ABUSE SANCTIONS TO FRAUD AND ABUSE AGAINST FEDERAL HEALTH CARE PROGRAMS.

(a) In General.--Section 1128B (42 U.S.C. 1320a-7b) is amended as follows: (1) In the heading, **by striking**

Medicare or state health care programs" **and inserting federal health care programs".**

(2) In subsection (a)(1), by striking a program under title XVIII or a State health care program (as defined in section 1128(h))" and inserting a **Federal health care program** (as defined in subsection (f))".

(3) In subsection (a)(5), by striking a program under title XVIII or a State health care program" and inserting a Federal health care program".

(4) In the second sentence of subsection (a)-- (A) by striking a State plan approved under title XIX" and inserting a Federal health care program", and (B) by striking the State may at its option (notwithstanding any other provision of that title or of such plan)" and inserting the administrator of such program may at its option (notwithstanding any other provision of such program)".

(5) In subsection (b), by striking title XVIII or a State health care program" each place it appears and inserting a **Federal health care program".**

(6) In subsection (c), by inserting (as defined in section 1128(h))" after a State health care program".

(7) By adding at the end the following new subsection:

(f) For purposes of this section, the term `**Federal health care program' means-- (1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code);** or (2) any State health care program, as defined in section 1128(h).".

(b) Effective (NOTE: 42 USC 1320a-7b note.) Date.--The amendments made by this section shall take effect on **January 1, 1997.**

SEC. 205. GUIDANCE REGARDING APPLICATION OF HEALTH CARE FRAUD AND ABUSE SANCTIONS.

Title XI (42 U.S.C. 1301 et seq.), as amended by section 201, is amended by inserting after section 1128C the following new section:

Sec. 1128D. (a) Solicitation (NOTE: 42 USC 1320a-7d.) and Publication of Modifications to Existing Safe Harbors and New Safe Harbors.-- (1) In general.-- (A) Solicitation (NOTE: Federal Register, publication.) of proposals for safe harbors.--Not later than January 1, 1997, and not less than annually thereafter, the Secretary shall publish a notice in the Federal Register soliciting proposals, which will be accepted during a 60-day period, for-- (i) modifications to existing safe harbors issued pursuant to section 14(a) of the Medicare and Medicaid Patient and Program Protection Act of 1987 (42 U.S.C. 1320a-7b note); (ii) additional safe harbors specifying payment practices that shall not be treated as a criminal offense under section 1128B(b) and shall not serve as the basis for an exclusion under section 1128(b)(7); (iii) advisory opinions to be issued pursuant to subsection (b); and (iv) special fraud alerts to be issued pursuant to subsection (c).

(B) Publication of proposed modifications and proposed additional safe (NOTE: Federal Register, publication.) harbors.--After considering the proposals described in clauses (i) and (ii) of subparagraph (A), the Secretary, in consultation with the Attorney General, shall publish in the Federal Register proposed modifications to existing safe harbors and proposed additional safe harbors, if appropriate, with a 60-day comment period. After considering any public comments received during this period, the Secretary shall issue final rules modifying the existing safe harbors and establishing new safe harbors, as appropriate.

(C) Report.--The Inspector General of the Department of Health and Human Services (in this section referred to as the `Inspector General') shall, in an annual report to Congress or as part of the year-end semiannual report required by section 5 of the Inspector General Act of 1978 (5 U.S.C. App.), describe the proposals received under clauses (i) and (ii) of subparagraph (A) and explain which proposals were included in the publication described in subparagraph (B), which proposals were not included in that publication, and the reasons for the rejection of the proposals that were not included.

(2) Criteria for modifying and establishing safe harbors.--In modifying and establishing safe harbors under paragraph (1)(B), the Secretary may consider the extent to which providing a safe harbor for the specified payment practice may result in any of the following: (A) An increase or decrease in access to health care services.

(B) An increase or decrease in the quality of health care services.

(C) An increase or decrease in patient freedom of choice among health care providers.

(D) An increase or decrease in competition among health care providers.

(E) An increase or decrease in the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

(F) **An increase or decrease in the cost to Federal health care programs (as defined in section 1128B(f)).**

(G) **An increase or decrease in the potential overutilization of health care services.**

(H) The existence or nonexistence of any potential financial benefit to a health care professional or provider which may vary based on their decisions of-- (i) **whether to order a health care item or service;** or (ii) **whether to arrange for a referral of health care items or services to a particular practitioner or provider.**

(I) **Any other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs (as so defined).**

(b) Advisory Opinions.-- (1) Issuance of advisory opinions.-- The Secretary, in consultation with the Attorney General, shall issue written advisory opinions as provided in this subsection.

(2) Matters subject to advisory opinions.--The Secretary shall issue advisory opinions as to the following matters: (A) What **constitutes prohibited remuneration** within the meaning of section 1128B(b).

(B) Whether an arrangement or proposed arrangement satisfies the criteria set forth in section 1128B(b)(3) for activities which do not result in **prohibited remuneration**.

(C) Whether an arrangement or proposed arrangement satisfies the criteria which the Secretary has established, or shall establish by regulation for activities which do not result in **prohibited remuneration**.

(D) What constitutes an inducement to reduce or limit services to individuals entitled to benefits under title XVIII or title XIX within the meaning of section 1128B(b).

(E) Whether any activity or proposed activity constitutes grounds for the imposition of a sanction under section 1128, 1128A, or 1128B.

(3) Matters not subject to advisory opinions.--Such advisory opinions shall not address the following matters: (A) Whether the fair market value shall be, or was paid or received for any goods, services or property.

(B) Whether an individual is **a bona fide employee** within the requirements of section 3121(d)(2) of the Internal Revenue Code of 1986.

(4) **Effect of advisory opinions.-- (A) Binding as to secretary and parties involved.--Each advisory opinion issued by the Secretary shall be binding as to the Secretary and the party or parties requesting the opinion.**

(B) Failure to seek opinion.--The failure of a party to seek an advisory opinion may not be introduced into evidence to prove that the party intended to violate the provisions of sections 1128, 1128A, or 1128B.

(5) Regulations.-- (A) In general.--Not later than 180 days after the date of the enactment of this section, the Secretary shall issue regulations to carry out this section. Such regulations shall provide for-- (i) the procedure to be followed by a party applying for an advisory opinion; (ii) the procedure to be followed by the Secretary in responding to a request for an advisory opinion; (iii) the interval in which the Secretary shall respond; (iv) the reasonable fee to be charged to the party requesting an advisory opinion; and (v) the manner in which advisory opinions will be made available to the public.

(B) Specific contents.--Under the regulations promulgated pursuant to subparagraph (A)-- (i) the Secretary shall be required to issue to a party requesting an advisory opinion by not later than 60 days after the request is received; and (ii) the fee charged to the party requesting an advisory opinion shall be equal to the costs incurred by the Secretary in responding to the request.

(6) Application of subsection.--This subsection shall apply to requests for advisory opinions made on or after the date which is 6 months after the date of enactment of this section and before the date which is 4 years after such date of enactment.

(c) Special Fraud Alerts.-- (1) In general.-- (A) Request for special fraud alerts.--Any person may present, at any time, a request to the Inspector General for a notice which informs the public of practices which the Inspector General considers to be suspect or of particular concern under the Medicare program under title XVIII or a State health care program, as defined in section 1128(h) (in this subsection referred to as a 'special fraud alert').

(B) Issuance and publication of special fraud alerts.--Upon receipt of a request described in subparagraph (A), the Inspector General shall investigate the subject matter of the request to determine whether a special fraud alert should be issued. If appropriate, the Inspector General shall issue a special fraud alert in response to the request.

All special fraud alerts issued pursuant to this subparagraph shall be published in the Federal Register.

(2) Criteria for special fraud alerts.--In determining whether to issue a special fraud alert upon a request described in paragraph (1), the Inspector General may consider-- (A) whether and to what extent the practices that would be identified in the special fraud alert may result in any of the consequences described in subsection (a)(2); and (B) the volume and frequency of the conduct that would be identified in the special fraud alert.".

Subtitle B--Revisions to Current Sanctions for Fraud and Abuse

SEC. 211. MANDATORY EXCLUSION FROM PARTICIPATION IN MEDICARE AND STATE HEALTH CARE PROGRAMS.

(a) Individual Convicted of Felony Relating to Health Care Fraud.-- (1) In general.--Section 1128(a) (42 U.S.C. 1320a-7(a)) is amended by adding at the end the following new paragraph: (3) Felony conviction relating to health care fraud.--Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by **or financed in whole or in part by any Federal,** State, or local **government agency**, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, **breach of fiduciary responsibility**, or other financial misconduct.".

(2) Conforming amendment.--Paragraph (1) of section 1128(b) (42 U.S.C. 1320a-7(b)) is amended to read as follows: (1) Conviction relating to fraud.--Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law-- (A) of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct-- (i) in connection with the delivery of a health care item or service, or (ii) with respect to any act or omission in a health care program (other than those specifically described in subsection (a)(1)) operated by or financed in whole or in part by any Federal, State, or local government agency; or (B) of a criminal offense relating to fraud, theft, embezzlement, **breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program (other than a health care program) operated by or financed in whole or in part by any Federal, State, or local government agency.".**

(b) Individual Convicted of Felony Relating to Controlled Substance.-- (1) In general.--Section 1128(a) (42 U.S.C. 1320a-7(a)), as amended by subsection (a), is amended by adding at the end the following new paragraph: (4) Felony conviction relating to controlled substance.-- Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.".

(2) Conforming amendment.--Section 1128(b)(3) (42 U.S.C. 1320a-7(b)(3)) is amended-- (A) in the heading, by striking Conviction" and inserting Misdemeanor conviction"; and (B) by striking criminal offense" and inserting criminal offense consisting of a misdemeanor".

SEC. 212. ESTABLISHMENT OF MINIMUM PERIOD OF EXCLUSION FOR CERTAIN INDIVIDUALS AND ENTITIES SUBJECT TO PERMISSIVE EXCLUSION FROM MEDICARE AND STATE HEALTH CARE PROGRAMS.

Section 1128(c)(3) (42 U.S.C. 1320a-7(c)(3)) is amended by adding at the end the following new subparagraphs: (D) In the case of an exclusion of an individual or entity under paragraph (1), (2), or (3) of subsection (b), the period of the exclusion shall be 3 years, unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances.

(E) In the case of an exclusion of an individual or entity under subsection (b)(4) or (b)(5), the period of the exclusion shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or the entity is excluded or suspended from a Federal or State health care program.

(F) In the case of an exclusion of an individual or entity under subsection (b)(6)(B), the period of the exclusion shall be not less than 1 year.".

SEC. 213. PERMISSIVE EXCLUSION OF INDIVIDUALS WITH OWNERSHIP OR CONTROL INTEREST IN SANCTIONED ENTITIES.

Section 1128(b) (42 U.S.C. 1320a-7(b)) is amended by adding at the end the following new paragraph: (15) Individuals controlling a sanctioned entity.--(A) Any individual-- (i) who has a direct or indirect ownership or control interest in a sanctioned entity and who knows or should know (as defined in section 1128A(i)(6)) of the action constituting the basis for the conviction or exclusion described in subparagraph (B); or (ii) who is an officer **or**

managing employee (as defined in section 1126(b)) of such an entity.

(B) For purposes of subparagraph (A), the term `sanctioned entity' means an entity-- (i) that has been convicted of any offense described in subsection (a) or in paragraph (1), (2), or (3) of this subsection; or (ii) that has been excluded from participation under a program under title XVIII or under a State health care program.".

SEC. 214. SANCTIONS AGAINST PRACTITIONERS AND PERSONS FOR FAILURE TO COMPLY WITH STATUTORY OBLIGATIONS.

(a) Minimum Period of Exclusion for Practitioners and Persons Failing To Meet Statutory Obligations.-- (1) In general.--The second sentence of section 1156(b)(1) (42 U.S.C. 1320c-5(b)(1)) is amended by striking may prescribe)" and inserting may prescribe, except that such period may not be less than 1 year)".

(2) Conforming amendment.--Section 1156(b)(2) (42 U.S.C. 1320c-5(b)(2)) is amended by striking shall remain" and inserting shall (subject to the minimum period specified in the second sentence of paragraph (1)) remain".

(b) Repeal of Unwilling or Unable" Condition for Imposition of Sanction.--Section 1156(b)(1) (42 U.S.C. 1320c-5(b)(1)) is amended-- (1) in the second sentence, by striking and determines" and all that follows through such obligations,"; and (2) by striking the third sentence.

SEC. 215. INTERMEDIATE SANCTIONS FOR MEDICARE HEALTH MAINTENANCE ORGANIZATIONS.

(a) Application of Intermediate Sanctions for any Program Violations.-- (1) In general.--Section 1876(i)(1) (42 U.S.C. 1395mm(i)(1)) is amended by striking the Secretary may terminate" and all that follows and inserting in accordance with procedures established under paragraph (9), the Secretary may at any time terminate any such contract or may impose the intermediate sanctions described in paragraph (6)(B) or (6)(C) (whichever is applicable) on the eligible organization if the Secretary determines that the organization-- (A) has failed substantially to carry out the contract; (B) is carrying out the contract in a manner substantially inconsistent with the efficient and effective administration of this section; or (C) no longer substantially meets the applicable conditions of subsections (b), (c), (e), and (f).".

(2) Other intermediate sanctions for **miscellaneous program violations.**--Section 1876(i)(6) (42 U.S.C. 1395mm(i)(6)) is amended by adding at the end the following new subparagraph:

(C) In the case of an eligible organization for which the Secretary makes a determination under paragraph (1), the basis of which is not described in subparagraph (A), the Secretary may apply the following intermediate sanctions: (i) Civil money penalties of not more than $25,000 for each determination under paragraph (1) **if the deficiency that is the basis of the determination has directly adversely affected (or has the substantial likelihood of adversely affecting) an individual covered under the organization's contract.**

(ii) Civil money penalties of not more than $10,000 for each week beginning after the initiation of procedures by the Secretary under paragraph (9) during which the deficiency that is the basis of a determination under paragraph (1) exists.

(iii) Suspension of enrollment of individuals under this section after the date the Secretary notifies the organization of a determination under paragraph (1) and until the Secretary is satisfied that the deficiency that is the basis for the determination has been corrected and is not likely to recur.".

(3) Procedures for imposing sanctions.--Section 1876(i) (42 U.S.C. 1395mm(i)) is amended by adding at the end the following new paragraph:

(9) The Secretary may terminate a contract with an eligible organization under this section or may impose the intermediate sanctions described in paragraph (6) on the organization in accordance with formal investigation and compliance procedures established by the Secretary under which-- (A) the Secretary first provides the organization with the reasonable opportunity to develop and implement a corrective action plan to correct the deficiencies that were the basis of the Secretary's determination under paragraph (1) and the organization fails to develop or implement such a plan; (B) in deciding whether to impose sanctions, the Secretary considers aggravating factors such as whether an organization has a history of deficiencies or has not taken action to correct deficiencies the Secretary has brought to the organization's attention; (C) there are no unreasonable or unnecessary delays between the finding of a deficiency and the imposition of sanctions; and (D) the Secretary provides the organization with reasonable notice and opportunity for hearing (including the right to appeal an initial decision) before imposing any sanction or terminating the contract.".

(4) Conforming amendments.--Section 1876(i)(6)(B) (42 U.S.C.

1395mm(i)(6)(B)) is amended by striking the second sentence.

(b) Agreements With Peer Review Organizations.--Section 1876(i)(7)(A) (42 U.S.C. 1395mm(i)(7)(A)) is amended by striking an agreement" and inserting a written agreement".

(c) Effective (NOTE: 42 USC 1395mm note.) Date.--The amendments made by this section shall apply with respect to contract years beginning **on or after January 1, 1997.**

SEC. 216. ADDITIONAL EXCEPTION TO ANTI-KICKBACK PENALTIES FOR RISK-SHARING ARRANGEMENTS.

(a) In General.--Section 1128B(b)(3) (42 U.S.C. 1320a-7b(b)(3)) is amended-- (1) by striking and" at the end of subparagraph (D); (2) by striking the period at the end of subparagraph (E) and inserting ; and"; and (3) by adding at the end the following new subparagraph: (F) any remuneration between an organization and an individual or entity providing items or services, or a combination thereof, pursuant to a written agreement between the organization and the individual or entity if the organization is an eligible organization under section 1876 or if the written agreement, through a risk-sharing arrangement, places the individual or entity at substantial financial risk for the cost or utilization of the items or services, or a combination thereof, which the individual or entity is obligated to provide.".

(b) Negotiated (NOTE: 42 USC 1320a-7b note.) Rulemaking for Risk- Sharing Exception.-- (1) Establishment.-- (A) In general.--The Secretary of Health and Human Services (in this subsection referred to as the Secretary") shall establish, on an expedited basis and using a negotiated rulemaking process under subchapter 3 of chapter 5 of title 5, United States Code, standards relating to the exception for risk-sharing arrangements to the anti-kickback penalties described in section 1128B(b)(3)(F) of the Social Security Act, as added by subsection (a).

(B) **Factors to consider.--In establishing standards** relating to the exception for risk-sharing arrangements to the **anti-kickback** penalties under subparagraph (A), the Secretary-- (i) shall consult with the Attorney General and representatives of the hospital, physician, other health practitioner, and health plan communities, and other interested parties; and (ii) shall take into account-- (I) the level of risk appropriate to the size and type of arrangement; (II) the frequency of assessment and distribution of incentives; (III) the level of capital contribution; **and (IV) the extent to which the risk- sharing arrangement provides incentives to control the cost and quality of health care services.**

(2) Publication of notice.--In carrying out the rulemaking process under this subsection, the Secretary shall publish the notice provided for under section 564(a) of title 5, United States Code, by not later than 45 days after the date of the enactment of this Act.

(3) Target date for publication of rule.--As part of the notice under paragraph (2), and for purposes of this subsection, the target date for publication" (referred to in section 564(a)(5) of such title) shall be **January 1, 1997**.

(4) Abbreviated period for submission of comments.--In applying section 564(c) of such title under this subsection, 15 days" shall be substituted for 30 days".

(5) Appointment of negotiated rulemaking committee and facilitator.--The Secretary shall provide for-- (A) the appointment of a negotiated rulemaking committee under section 565(a) of such title by not later than 30 days after the end of the comment period provided for under section 564(c) of such title (as shortened under paragraph (4)), and (B) the nomination of a facilitator under section 566(c) of such title by not later than 10 days after the date of appointment of the committee.

(6) Preliminary committee report.--The negotiated rulemaking committee appointed under paragraph (5) shall report to the Secretary, by not later than October 1, 1996, regarding the committee's progress on achieving a consensus with regard to the rulemaking proceeding and whether such consensus is likely to occur before one month before the target date for publication of the rule. If the committee reports that the committee has failed to make significant progress toward such consensus or is unlikely to reach such consensus by the target date, the Secretary may terminate such process and provide for the publication of a rule under this subsection through such other methods as the Secretary may provide.

(7) Final committee report.--If the committee is not terminated under paragraph (6), the rulemaking committee

shall submit a report containing a proposed rule by not later than one month before the target publication date.

(8) Interim, final (NOTE: Federal Register, publication.) effect.--The Secretary shall publish a rule under this subsection in the Federal Register by not later than the target publication date. Such rule shall be effective and final immediately on an interim basis, but is subject to change and revision after public notice and opportunity for a period (of not less than 60 days) for public comment. In connection with such rule, the Secretary shall specify the process for the timely review and approval of applications of entities to be certified as provider-sponsored organizations pursuant to such rules and consistent with this subsection.

(9) Publication of rule after public comment.--The Secretary shall provide for consideration of such comments and republication of such rule by not later than 1 year after the target publication date.

(c) Effective (NOTE: 42 USC 1320a-7b note.) Date.--The amendments made by subsection (a) shall apply to written agreements entered into on or after **January 1, 1997**, without regard to whether regulations have been issued to implement such amendments.

SEC. 217. CRIMINAL PENALTY FOR FRAUDULENT DISPOSITION OF ASSETS IN ORDER TO OBTAIN MEDICAID BENEFITS.

Section 1128B(a) (42 U.S.C. 1320a-7b(a)) is amended-- (1) by striking or" at the end of paragraph (4); (2) by adding or" at the end of paragraph (5); and (3) by inserting after paragraph (5) the following new paragraph: (6) knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c),".

SEC. 218. EFFECTIVE (NOTE: 42 USC 1320a-7 note.) DATE.

Except as otherwise provided, the amendments made by this subtitle shall take **effect January 1, 1997**.

Subtitle C--Data Collection

SEC. 221. ESTABLISHMENT OF THE HEALTH CARE FRAUD AND ABUSE DATA COLLECTION PROGRAM.

(a) In General.--Title XI (42 U.S.C. 1301 et seq.), as amended by sections 201 and 205, is amended by inserting after section 1128D the following new section:

Sec. 1128E. (a) General (NOTE: 42 USC 1320a-7e.) Purpose.--Not later than January 1, 1997, the Secretary shall establish a national health care fraud and abuse data collection program for the reporting of final adverse actions (not including settlements in which no findings of liability have been made) against health care providers, suppliers, or practitioners as required by subsection (b), with access as set forth in subsection (c), and shall maintain a database of the information collected under this section.

(b) Reporting of Information.-- (1) In general.--Each Government agency and health plan shall report any final adverse action (not including settlements in which no findings of liability have been made) taken against a health care provider, supplier, or practitioner.

(2) Information to be reported.--The information to be reported under paragraph (1) includes: (A) The name and TIN (as defined in section 7701(a)(41) of the Internal Revenue Code of 1986) of any health care provider, supplier, or practitioner who is the subject of a final adverse action.

(B) The name (if known) of any health care entity with which a health care provider, supplier, or practitioner, who is the subject of a final adverse action, is affiliated or associated.

(C) The nature of the final adverse action and whether such action is on appeal.

(D) A description of the acts or omissions and injuries upon which the final adverse action was based, and such other information as the Secretary determines by regulation is required for appropriate interpretation of information reported under this section.

(3) Confidentiality.--In determining what information is required, the Secretary shall include procedures to assure that the privacy of individuals receiving health care services is appropriately protected.

(4) Timing and form of reporting.--The information required to be reported under this subsection shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall first be required to be reported on a date specified by the Secretary.

(5) To whom reported.--The information required to be reported under this subsection shall be reported to the Secretary.

(c) Disclosure and Correction of Information.-- (1) Disclosure.--With respect to the information about final adverse actions (not including settlements in which no findings of liability have been made) reported to the Secretary under this section with respect to a health care provider, supplier, or practitioner, the Secretary shall, by regulation, provide for-- (A) disclosure of the information, upon request, to the health care provider, supplier, or licensed practitioner, and (B) procedures in the case of disputed accuracy of the information.

(2) Corrections.--Each Government agency and health plan shall report corrections of information already reported about any final adverse action taken against a health care provider, supplier, or practitioner, in such form and manner that the Secretary prescribes by regulation.

(d) Access to Reported Information.-- (1) Availability.--The information in the database maintained under this section shall be available to **Federal** and State **government agencies and health plans** pursuant to procedures that the Secretary shall provide by regulation.

(2) Fees for disclosure.--The Secretary may establish or approve reasonable fees for the disclosure of information in such database (other than with respect to requests by Federal agencies). The amount of such a fee shall be sufficient to recover the full costs of operating the database. Such fees shall be available to the Secretary or, in the Secretary's discretion to the agency designated under this section to cover such costs.

(e) Protection From Liability for Reporting.--No person or entity, including the agency designated by the Secretary in subsection (b)(5) shall be held liable in any civil action with respect to any report made **as required by this section**, **without knowledge of the falsity** of the information contained in the report.

(f) Coordination With National Practitioner Data Bank.--The Secretary shall implement this section in such a manner as to avoid duplication with the reporting requirements established for the National Practitioner Data Bank under the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.).

(g) Definitions and Special Rules.--For purposes of this section: (1) Final adverse action.-- (A) In general.--The term `final adverse action' includes: (i) Civil judgments against a health care provider, supplier, or practitioner in Federal or State court related to the delivery of a health care item or service.

(ii) Federal or State criminal convictions related to the delivery of a health care item or service.

(iii) Actions by Federal or State agencies responsible for the licensing and certification of health care providers, suppliers, and licensed health care practitioners, including-- (I) formal or official actions, such as revocation or suspension of a license (and the length of any such suspension), reprimand, censure or probation, (II) any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non- renewability, or otherwise, or (III) any other negative action or finding by such Federal or State agency that is publicly available information.

(iv) Exclusion from participation in Federal or State health care programs (as defined in sections 1128B(f) and 1128(h), respectively).

(v) **Any other adjudicated actions or decisions** that the Secretary shall establish by regulation.

(B) Exception.--The term does not include any action with respect to a malpractice claim.

(2) Practitioner.--The terms `licensed health care practitioner', `licensed practitioner', and `practitioner' mean, with respect to a State, an individual who is licensed or otherwise authorized by the State to provide health care services (or any individual who, without authority holds himself or herself out to be so licensed or authorized).

(3) Government agency.--The term **`Government agency' shall** include:

(A) The Department of Justice.

(B) The Department of Health and Human Services.

(C) **Any other Federal agency that either administers or provides payment for the delivery of health care services, including, but not limited to the Department of Defense and the Veterans' Administration.**

(D) State law enforcement agencies.

(E) State Medicaid fraud control units.

(F) Federal or State agencies responsible for the licensing and certification of health care providers and licensed health care practitioners.

(4) Health plan.--The term `health plan' has the meaning given such term by section 1128C(c).

(5) Determination of conviction.--For purposes of paragraph (1), the existence of a conviction shall be determined under paragraph (4) of section 1128(i).".

(b) Improved Prevention in Issuance of Medicare Provider Numbers.-- Section 1842(r) (42 U.S.C. 1395u(r)) is amended by adding at the end the following new sentence: Under such system, the Secretary may impose appropriate fees on such physicians to cover the costs of investigation and recertification activities with respect to the issuance of the identifiers.".

Subtitle D--Civil Monetary Penalties

SEC. 231. SOCIAL SECURITY ACT CIVIL MONETARY PENALTIES.

(a) General Civil Monetary Penalties.--Section 1128A (42 U.S.C.

1320a-7a) is amended as follows: (1) In the third sentence of subsection (a), by striking programs under title XVIII" and inserting **Federal health care programs** (as defined in section 1128B(f)(1))".

(2) In subsection (f)-- (A) by redesignating paragraph (3) as paragraph (4); and (B) by inserting after paragraph (2) the following new paragraph: (3) With respect to amounts recovered arising out of a claim under a **Federal health care program** (as defined in section 1128B(f)), the portion of such amounts as is determined to have been paid by the program shall be repaid to the program, and the portion of such amounts attributable to the amounts recovered under this section by reason of the amendments made by the Health Insurance Portability and Accountability Act of 1996 (as estimated by the Secretary) shall be deposited into the Federal Hospital Insurance Trust Fund pursuant to section 1817(k)(2)(C).".

(3) In subsection (i)-- (A) in paragraph (2), by striking title V, XVIII, XIX, or XX of this Act" and inserting a **Federal health care program** (as defined in section 1128B(f))", (B)

in paragraph (4), by striking a health insurance or medical services program under title XVIII or XIX of this Act" and inserting a **Federal health care program** (as so defined)", and (C) in paragraph (5), by striking title V, XVIII, XIX, or XX" and inserting a **Federal health care program** (as so defined)".

(4) By adding at the end the following new subsection:

(m)(1) For purposes of this section, with respect to a Federal health care program not contained in this Act, **references to the Secretary in this section shall be deemed to be references to the Secretary or Administrator of the department or agency with jurisdiction over such program** and references to the Inspector General of the Department of Health and Human Services in this section shall be deemed to be references to the Inspector General of the applicable department or agency.

(2)(A) The Secretary and Administrator of the departments and agencies referred to in paragraph (1) **may include in any action pursuant to this section, claims within the jurisdiction of other Federal departments or agencies as long as the following conditions are satisfied: (i) The case involves primarily claims submitted to the Federal health care programs of the department or agency initiating the action.**

(ii) The Secretary or Administrator of the department or agency initiating the action gives notice and an opportunity to participate in the investigation to the Inspector General of the department or agency with primary jurisdiction over the Federal **health care programs** to which the claims were submitted.

(B) If the conditions specified in subparagraph (A) are fulfilled, the Inspector General of the department or agency initiating the action is authorized to exercise all powers granted under the Inspector General Act of 1978 (5 U.S.C. App.) with respect to the claims submitted to the other departments or agencies to the same manner and extent as provided in that Act with respect to claims submitted to such departments or agencies.".

(b) Excluded Individual Retaining Ownership or Control Interest in Participating Entity.--Section 1128A(a) (42 U.S.C. 1320a-7a(a)) is amended-- (1) by striking or" at the end of paragraph (1)(D); (2) by striking , or" at the end of paragraph (2) and inserting a semicolon; (3) by striking the semicolon at the end of paragraph (3) and inserting ; or"; and (4) by inserting after paragraph (3) the following new paragraph: (4) in the case of a person who is not an organization, agency, or other entity, is excluded from participating in a program under title XVIII or a State health care program in accordance with this subsection or under section 1128 and who, at the time of a violation of this subsection-- (A) retains a direct or indirect ownership or control interest in an entity that is participating in a program under title XVIII or a State health care program, and who knows or should know of the action constituting the basis for the exclusion; or (B) is an officer **or managing employee** (as defined in section 1126(b)) of such an entity;".

(c) Modifications of Amounts of Penalties and Assessments.--Section 1128A(a) (42 U.S.C. 1320a-7a(a)), as amended by subsection (b), is amended in the matter following paragraph (4)-- (1) by striking $2,000" and inserting $10,000"; (2) by inserting ; in cases under paragraph (4), $10,000 for each day the prohibited relationship occurs" **after false or misleading information was given"**; and (3) by striking twice the amount" and inserting 3 times the amount".

(d) **Clarification of Level of Knowledge Required for Imposition of Civil Monetary Penalties**.-- (1) In general.--Section 1128A(a) (42 U.S.C. 1320a-7a(a)) is amended-- (A) in paragraphs (1) and (2), by inserting **knowingly**" before presents" each place it appears; and (B) in paragraph (3), by striking gives" and inserting **knowingly gives or causes to be given"**.

(2) **Definition of standard**.--Section 1128A(i) (42 U.S.C.

1320a-7a(i)), as amended by subsection (h)(2), is amended by adding at the end the following new paragraph: (7) The term **`should know'** means that a person, with respect to information-- (A) **acts in deliberate ignorance of the truth or falsity of the information**; or (B) **acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.".**

(e) **Claim for Item or Service Based on Incorrect Coding or Medically Unnecessary Services**.--Section 1128A(a)(1) (42 U.S.C. 1320a-7a(a)(1)), as amended by subsection (b), is amended-- (1) in subparagraph (A) by striking claimed," and inserting claimed, including any person who engages in a pattern or practice of presenting **or causing to be presented** a claim for an item or service **that is based on a code that the person knows or should know will result in a greater payment to the person than the code the person knows or should know is applicable to the item or service actually provided**,"; (2) in subparagraph (C), by striking or" at the end; (3) in subparagraph (D), by striking the semicolon and inserting , or"; and (4) by inserting after subparagraph (D) the following new subparagraph: (E) is for a pattern of medical or other items or services that a person **knows or should know are not medically necessary;".**

(f) **Sanctions Against Practitioners and Persons for Failure To Comply With Statutory Obligations**.--Section 1156(b)(3) (42 U.S.C. 1320c- 5(b)(3)) is amended by striking the actual or estimated cost" and inserting up to $10,000 for each instance".

(g) Procedural Provisions.--Section 1876(i)(6) (42 U.S.C. 1395mm(i)(6)), as amended by section 215(a)(2), is amended by adding at the end the following new subparagraph: (D) The provisions of section 1128A (other than subsections (a) and (b)) shall apply to a civil money penalty under subparagraph (B)(i) or (C)(i) in the same manner as such provisions apply to a civil money penalty or proceeding under section 1128A(a).".

(h) **Prohibition Against Offering Inducements to Individuals Enrolled Under Programs or Plans**.-- (1) Offer of remuneration.--Section 1128A(a) (42 U.S.C.

1320a-7a(a)), as amended by subsection (b), is amended-- (A) by striking or" at the end of paragraph (3); (B) by striking the semicolon at the end of paragraph (4) and inserting ; or"; and (C) by inserting after paragraph (4) the following new paragraph: (5) offers to or transfers remuneration to any individual eligible for benefits under title XVIII of this Act, or under a State health care program (as defined in section 1128(h)) **that such person knows or should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, under title XVIII,** or a State health care program (as so defined);".

(2) Remuneration defined.--Section 1128A(i) (42 U.S.C.

1320a-7a(i)) is amended by adding at the end the following new paragraph: (6) The term `remuneration' includes the waiver of coinsurance and deductible amounts (or any part thereof), and transfers of items or services for free or for other than fair market value. The term `remuneration' does not include-- (A) the waiver of coinsurance and deductible amounts by a person, if-- (i) the waiver is not offered as part of any advertisement or solicitation; (ii) the person does not routinely waive coinsurance or deductible amounts; and (iii) the person-- (I) waives the coinsurance and deductible amounts after determining in good faith that the individual is in financial need; (II) fails to collect coinsurance or deductible amounts after making reasonable collection efforts; or (III) provides for any permissible waiver as specified in section 1128B(b)(3) or in regulations issued by the Secretary; (B) differentials in coinsurance and deductible amounts as part of a benefit plan design as long as the differentials have been disclosed in writing to all beneficiaries, third party payers, and providers, to whom claims are presented and as long as the differentials meet the standards as defined in regulations promulgated by the Secretary not later than 180 days after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996; or (C) incentives given to individuals to promote the delivery of preventive care as determined by the Secretary in regulations so promulgated.".

(i) Effective (NOTE: 42 USC 1320a-7a note.) Date.--The amendments made by this section shall apply to acts or omissions occurring on or after January 1, 1997.

SEC. 232. PENALTY FOR FALSE CERTIFICATION FOR HOME HEALTH SERVICES.

(a) In General.--Section 1128A(b) (42 U.S.C. 1320a-7a(b)) is amended by adding at the end the following new paragraph: (3)(A) Any physician who executes a document described in subparagraph (B) with respect to an individual knowing that all of the requirements referred to in such subparagraph are not met with respect to the individual shall be subject to a civil monetary penalty of not more than the greater of-- (i) $5,000, or (ii) three times the amount of the payments under title XVIII for home health services which are made pursuant to such certification.

(B) A document described in this subparagraph is any document that certifies, for purposes of title XVIII, that an individual meets the requirements of section 1814(a)(2)(C) or 1835(a)(2)(A) in the case of home health services furnished to the individual.".

(b) Effective (NOTE: 42 USC 1320a-7a note.) Date.--The amendment made by subsection (a) shall apply to certifications made on or after the date of the enactment of this Act.

Subtitle E--Revisions to Criminal Law

SEC. 241. DEFINITIONS RELATING TO FEDERAL HEALTH CARE OFFENSE.

(a) In General.--Chapter 1 of title 18, United States Code, is amended by adding at the end the following:

Sec. 24. Definitions relating to Federal health care offense

(a) As used in this title, the term `Federal health care offense' means a violation of, **or a criminal conspiracy to violate**-- (1) section 669, 1035, 1347, or 1518 of this title; (2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 of this title, **if the violation or conspiracy relates to a health care benefit program.**

(b) **As used in this title, the term `health care benefit program' means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract."**.

(b) Clerical Amendment.--The table of sections at the beginning of chapter 2 of title 18, United States Code, is amended by inserting after the item relating to section 23 the following new item:

24. Definitions relating to Federal health care offense.".

SEC. 242. HEALTH CARE FRAUD.

(a) Offense.-- (1) In general.--Chapter 63 of title 18, United States Code, is amended by adding at the end the following:

Sec. 1347. Health care fraud

Whoever **knowingly and willfully executes, or attempts to execute, a scheme or artifice**-- (1) **to defraud any health care benefit program; or** (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, **any health care benefit program**, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.".

(2) Clerical amendment.--The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following:

1347. Health care fraud.".

(b) Criminal (NOTE: 42 USC 1395i note.) Fines Deposited in Federal Hospital Insurance Trust Fund.--The Secretary of the Treasury shall deposit into the Federal Hospital Insurance Trust Fund pursuant to section 1817(k)(2)(C) of the Social Security Act (42 U.S.C. 1395i) an amount equal to the criminal fines imposed under section 1347 of title 18, United States Code (relating to health care fraud).

SEC. 243. THEFT OR EMBEZZLEMENT.

(a) In General.--Chapter 31 of title 18, United States Code, is amended by adding at the end the following:

Sec. 669. Theft or embezzlement in connection with health care

(a) Whoever **knowingly and willfully** embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of **a health care benefit program**, shall be fined under this title or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of $100 the defendant shall be fined under this title or imprisoned not more than one year, or both.

(b) **As used in this section, the term `health care benefit program' has the meaning given such term in section 24(b) of this title.".**

(b) Clerical Amendment.--The table of sections at the beginning of chapter 31 of title 18, United States Code, is amended by adding at the end the following:

669. Theft or embezzlement in connection with health care.".

SEC. 244. FALSE STATEMENTS.

(a) In General.--Chapter 47 of title 18, United States Code, is amended by adding at the end the following:

Sec. 1035. False statements relating to health care matters

(a) Whoever, in any matter involving a health care benefit program, **knowingly and willfully**-- (1) **falsifies, conceals, or covers up by any trick, scheme, or device a material fact**; **or** (2) **makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement** **or entry**, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section, the term `health care benefit program' has the meaning given such term in section 24(b) of this title.".

(b) Clerical Amendment.--The table of sections at the beginning of chapter 47 of title 18, United States Code, is amended by adding at the end the following new item:

1035. False statements relating to health care matters.".

SEC. 245. OBSTRUCTION OF CRIMINAL INVESTIGATIONS OF HEALTH CARE OFFENSES.

(a) In General.--Chapter 73 of title 18, United States Code, is amended by adding at the end the following: Sec. 1518. Obstruction of criminal investigations of health care offenses

(a) Whoever **willfully** prevents, obstructs, **misleads**, delays or attempts to prevent, obstruct, mislead, or delay the communication of **information or records relating to a violation of a Federal health care offense** to a criminal investigator shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section the term `criminal investigator' means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses.".

(b) Clerical Amendment.--The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by adding at the end the following new item:

1518. Obstruction of criminal investigations of health care offenses.".

SEC. 246. LAUNDERING OF MONETARY INSTRUMENTS.

Section 1956(c)(7) of title 18, United States Code, is amended by adding at the end the following: (F) Any act or activity constituting an offense involving a Federal health care offense.".

SEC. 247. INJUNCTIVE RELIEF RELATING TO HEALTH CARE OFFENSES.

(a) In General.--Section 1345(a)(1) of title 18, United States Code, is amended-- (1) by striking or" at the end of subparagraph (A); (2) by inserting or" at the end of subparagraph (B); and (3) by adding at the end the following: (C) **committing or about to commit a Federal health care offense."**.

(b) Freezing of Assets.--Section 1345(a)(2) of title 18, United States Code, is amended by inserting or a Federal health care offense" after title)".

SEC. 248. AUTHORIZED INVESTIGATIVE DEMAND PROCEDURES.

(a) In General.--Chapter 223 of title 18, United States Code, is amended by adding after section 3485 the following:

Sec. 3486. Authorized investigative demand procedures

(a) Authorization.--(1) In any investigation relating to any act or activity involving a Federal health care offense, **the Attorney General or the Attorney General's designee may**

issue in writing and cause to be served a subpoena-- (A) requiring the production of any records (including any books, papers, documents, electronic media, or other objects or tangible things), which may be relevant to an authorized law enforcement inquiry, that a person or legal entity may possess or have care, custody, or control; or (B) requiring a custodian of records to give testimony **concerning the production and authentication of such records.**

(2) A subpoena under this subsection shall describe the objects required to be produced and prescribe a return date within a reasonable period of time within which the objects can be assembled and made available.

(3) The production of records shall not be required under this section at any place more than 500 miles distant from the place where the subpoena for the production of such records is served.

(4) Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Service.--A subpoena issued under this section may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it. Service upon a natural person may be made by personal delivery of the subpoena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

(c) Enforcement.--In the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpoena. The court may issue an order requiring the subpoenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony concerning the production and authentication of such records. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

All process in any such case may be served in any judicial district in which such person may be found.

(d) Immunity From Civil Liability.--Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, **receiving a summons under this section,** who complies in good faith with the summons and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer.

(e) Limitation on Use.--(1) **Health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health; or if authorized by an appropriate order of a court of competent jurisdiction, granted after application showing good cause therefore**.

(2) **In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient,** to the physician-patient relationship, and to the treatment services.

(3) Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.".

(b) Clerical Amendment.--The table of sections at the beginning of chapter 223 of title 18, United States Code, is amended by inserting after the item relating to section 3485 the following new item:

3486. Authorized investigative demand procedures.".

(c) Conforming Amendment.--Section 1510(b)(3)(B) of title 18, United States Code, is amended by inserting or a Department of Justice subpoena (issued under section 3486 of title 18)," after subpoena".

SEC. 249. FORFEITURES FOR FEDERAL HEALTH CARE OFFENSES.

(a) In General.--Section 982(a) of title 18, United States Code, is amended by adding after paragraph (5) the following new paragraph: (6) **The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense."**.

(b) Conforming Amendment.--Section 982(b)(1)(A) of title 18, United States Code, is amended by inserting or (a)(6)" after (a)(1)".

(c) Property Forfeited (NOTE: 42 USC 1395i note.) Deposited in Federal Hospital Insurance Trust Fund.-- (1) In general.--After the payment of the costs of asset forfeiture has been made and after all restoration payments (if any) have been made, and notwithstanding any other provision of law, the Secretary of the Treasury shall deposit into the Federal Hospital Insurance Trust Fund pursuant to section 1817(k)(2)(C) of the Social Security Act, as added by section 301(b), an amount equal to the net amount realized from the forfeiture of property by reason of a Federal health care offense pursuant to section 982(a)(6) of title 18, United States Code.

(2) Costs of asset forfeiture.--For purposes of paragraph (1), the term payment of the costs of asset forfeiture" means-- (A)

the payment, at the discretion of the Attorney General, of any expenses necessary to seize, detain, inventory, safeguard, maintain, advertise, sell, or dispose of property under seizure, detention, or forfeited, or of any other necessary expenses incident to the seizure, detention, forfeiture, or disposal of such property, including payment for-- (i) contract services; (ii) the employment of outside contractors to operate and manage properties or provide other specialized services necessary to dispose of such properties in an effort to maximize the return from such properties; and (iii) reimbursement of any Federal, State, or local agency for any expenditures made to perform the functions described in this subparagraph; (B) at the discretion of the Attorney General, the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Health Care Fraud and Abuse Control Account; (C) the compromise and payment of valid liens and mortgages against property that has been forfeited, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made, and the employment of attorneys and other personnel skilled in State real estate law as necessary; (D) payment authorized in connection with remission or mitigation procedures relating to property forfeited; and (E) the payment of State and local property taxes on forfeited real property that accrued between the date of the violation giving rise to the forfeiture and the date of the forfeiture order.

(3) Restoration payment.--Notwithstanding any other provision of law, if the Federal health care offense referred to in paragraph (1) resulted in a loss to an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974, the Secretary of the Treasury shall transfer to such employee welfare benefit plan, from the amount realized from the forfeiture of property referred to in paragraph (1), an amount equal to such loss. For purposes of paragraph (1), the term

restoration payment" means the amount transferred to an employee welfare benefit plan pursuant to this paragraph.

SEC. 250. RELATION (NOTE: 29 USC 1136 note.) TO ERISA AUTHORITY.

Nothing in this subtitle shall be construed as affecting the authority of the Secretary of Labor under section 506(b) of the Employee Retirement Income Security Act of 1974, including the Secretary's authority with respect to violations of title 18, United States Code (as amended by this subtitle).

Subtitle F--Administrative Simplification

SEC. 261. (NOTE: 42 USC 1320d note.) PURPOSE.

It is the purpose of this subtitle to improve the Medicare program under title XVIII of the Social Security Act, the Medicaid program under title XIX of such Act, and the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.

SEC. 262. ADMINISTRATIVE SIMPLIFICATION.

(a) In General.--Title XI (42 U.S.C. 1301 et seq.) is amended by adding at the end the following:

Part C--Administrative Simplification

Sec. 1171. For (NOTE: 42 USC 1320d.) purposes of this part:

(1) Code set.--The term `code set' means **any set of codes** used for encoding data elements, such as tables of terms, medical concepts, **medical diagnostic codes**, or medical procedure codes.

(2) Health care clearinghouse.--The term `health care clearinghouse' means **a public** or private entity **that processes or facilitates the processing of nonstandard data elements of health information into standard data elements**.

(3) Health care provider.--The term `health care provider' includes a provider of services (as defined in section 1861(u)), a provider of medical or other health services

(as defined in section 1861(s)), and any other person furnishing health care services or supplies.

(4) **Health information**.--The term `health information' means **any information**, whether oral or recorded in **any form or medium,** that-- (A) **is created** or received by a health care provider, health plan, public health authority, **employer**, life insurer, school or university, or health care clearinghouse; **and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.**

(5) **Health plan.--The term `health plan' means an individual or group plan that provides, or pays the cost of, medical care (as such term is defined in section 2791 of the Public Health Service Act). Such term includes the following, and any combination thereof: (A) A group health plan (as defined in section 2791(a) of the Public Health Service Act), but only if the plan-- (i) has 50 or more participants (as defined in section 3(7) of the Employee Retirement Income Security Act of 1974);** or (ii) is administered by an entity other than the employer who established and maintains the plan.

(B) **A health insurance issuer (as defined in section 2791(b) of the Public Health Service Act).**

(C) **A health maintenance organization (as defined in section 2791(b) of the Public Health Service Act).**

(D) Part A or part B of the Medicare program under title XVIII.

(E) The Medicaid program under title XIX.

(F) A Medicare supplemental policy (as defined in section 1882(g)(1)).

(G) A long-term care policy, including a nursing home fixed indemnity policy (unless the Secretary determines that such a policy does not provide sufficiently comprehensive coverage of a benefit so that the policy should be treated as a health plan).

(H) **An employee welfare benefit plan** or any other arrangement which is established or maintained for the purpose of offering or providing health benefits to the employees of 2 or more employers.

(I) **The health care program for active military personnel under title 10, United States Code.**

(J) **The veteran's health care program under chapter 17 of title 38, United States Code.**

(K) The Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), as defined in section 1072(4) of title 10, United States Code.

(L) The Indian health service program under the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

(M) **The Federal Employees Health Benefit Plan under chapter 89 of title 5, United States Code**.

(6) Individually identifiable health information.--The term `individually identifiable health information' means **any information, including demographic information collected from an individual, that-- (A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and-- (i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.**

(7) **Standard**.--The term `standard', when used with reference to a data element of health information or a transaction referred to in section 1173(a)(1), means **any such data element or transaction** that meets each of the standards and implementation specifications adopted or established by

the Secretary with respect to the data element or transaction **under sections 1172 through 1174**.

(8) Standard setting organization.--The term `standard setting organization' means a standard setting organization accredited by the American National Standards Institute, including the National Council for Prescription Drug Programs, that develops standards for information transactions, data elements, or any other standard that is necessary to, or will facilitate, the implementation of this part.

Sec. 1172. (a) Applicability.--Any (NOTE: 42 USC 1320d-1.) standard adopted under this part shall apply, in whole or in part, to the following persons:

(1) A health plan.

(2) A health care clearinghouse.

(3) A **health care provider** who transmits any health information in electronic form in connection with a transaction referred to in section 1173(a)(1).

(b) **Reduction of Costs.--Any standard adopted under this part shall be consistent with the objective of reducing the administrative costs of providing and paying for health care.**

(c) Role of Standard Setting Organizations.-- (1) In general.--Except as provided in paragraph (2), any standard adopted under this part shall be a standard that has been developed, adopted, or modified by a standard setting organization.

(2) Special rules.-- (A) Different standards.--The Secretary may adopt a standard that is different from any standard developed, adopted, or modified by a standard setting organization, **if-- (i) the different standard will substantially reduce administrative costs to health care providers and health plans compared to the alternatives; and (ii) the standard is promulgated in accordance with the rulemaking procedures of subchapter III of chapter 5 of title 5, United States Code.**

(B) No standard by standard setting organization.--If no standard setting organization has developed, adopted, or modified any standard relating to a standard that the Secretary is authorized or required to adopt under this part-- (i) paragraph (1) shall not apply; and (ii) subsection (f) shall apply.

(3) Consultation requirement.-- (A) In general.--A standard may not be adopted under this part unless-- (i) in the case of a standard that has been developed, adopted, or modified by a standard setting organization, the organization consulted with each of the organizations described in subparagraph (B) in the course of such development, adoption, or modification; and (ii) in the case of any other standard, the Secretary, in complying with the requirements of subsection (f), consulted with each of the organizations described in subparagraph (B) before adopting the standard.

(B) Organizations described.--The organizations referred to in subparagraph (A) are the following: (i) The National Uniform Billing Committee.

(ii) **The National Uniform Claim Committee**.

(iii) The Workgroup for Electronic Data Interchange.

(iv) The American Dental Association.

(d) Implementation Specifications.--The Secretary shall establish specifications for implementing each of the standards adopted under this part.

(e) Protection of Trade Secrets.--Except as otherwise required by law, a standard adopted under this part shall not require disclosure of trade secrets or confidential commercial information by a person required to comply with this part.

(f) Assistance to the Secretary.--In complying with the requirements of this part, the Secretary shall rely on the recommendations of the National Committee on Vital and Health Statistics established under section 306(k) of the Public Health Service Act (42 U.S.C. 242k(k)), and shall consult with appropriate Federal and State agencies (NOTE:

Federal Register, publication.) and private organizations. The Secretary shall publish in the Federal Register any recommendation of the National Committee on Vital and Health Statistics regarding the adoption of a standard under this part.

(g) Application to Modifications of Standards.--This section shall apply to a modification to a standard (including an addition to a standard) adopted under section 1174(b) in the same manner as it applies to an initial standard adopted under section 1174(a).

Sec. 1173. (a) **Standards** (NOTE: 42 USC 1320d-2.)--To Enable Electronic Exchange.-- (1) In general.--**The Secretary shall adopt standards for transactions**, and data elements for such transactions, to enable health information to be exchanged electronically, that are appropriate for-- (A) the financial and **administrative transactions** described in paragraph (2); and (B) other financial and **administrative transactions** determined appropriate by the Secretary, consistent with the goals of improving the operation of the health care system **and reducing administrative costs.**

(2) **Transactions.--The transactions referred to in paragraph (1)(A) are transactions with respect to the following: (A) Health claims or equivalent encounter information**.

(B) Health claims attachments.

(C) Enrollment and disenrollment in a health plan.

(D) Eligibility for a health plan.

(E) Health care payment and remittance advice.

(F) Health plan premium payments.

(G) First report of injury.

(H) **Health claim status**.

(I) Referral certification and authorization.

(3) Accommodation of specific providers.--The standards adopted by the Secretary under paragraph (1) shall

accommodate the needs of different types of **health care providers.**

(b) Unique Health Identifiers.-- (1) In general.--The Secretary shall adopt standards providing for a standard unique health identifier **for each individual, employer, health plan**, and health care provider for use in the health care system. In carrying out the preceding sentence for each health plan and health care provider, the Secretary shall take into account multiple uses for identifiers and multiple locations and specialty classifications for health care providers.

(2) Use of identifiers.--The standards adopted under paragraph (1) shall specify the purposes for which a unique health identifier may be used.

(c) Code Sets.-- (1) In general.--The Secretary shall adopt standards that-- (A) select code sets for appropriate data elements for the transactions referred to in subsection (a)(1) from among the code sets that have been developed by private and public entities; or (B) establish code sets for such data elements if no code sets for the data elements have been developed.

(2) Distribution.--The Secretary shall establish efficient and low-cost procedures for distribution (including electronic distribution) of code sets and modifications made to such code sets under section 1174(b).

(d) Security Standards for Health Information.-- (1) Security standards.--The Secretary shall adopt security standards that-- (A) take into account-- (i) **the technical capabilities of record systems used** to maintain health information; (ii) the costs of security measures; (iii) the need for training persons who have access to health information; (iv) the value of audit trails in computerized record systems; and (v) the needs and capabilities of small health care providers and rural health care providers (as such providers are defined by the Secretary); and (B) ensure that a health care clearinghouse, if it is part of a larger organization, has policies and security procedures which isolate the activities of the health care clearinghouse with respect to processing information in a manner that prevents unauthorized access to such information by such larger organization.

(2) Safeguards.--Each person described in section 1172(a) who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards-- (A) **to ensure the integrity and confidentiality of the information**; (B) to protect against any reasonably anticipated-- (i) threats or hazards to the security or integrity of the information; and (ii) **unauthorized uses or disclosures of the information;** and (C) otherwise to ensure compliance with this part by the officers and employees of such person.

(e) Electronic Signature.-- (1) Standards.--The Secretary, in coordination with the Secretary of Commerce, shall adopt standards specifying procedures for the electronic transmission and authentication of signatures with respect to the transactions referred to in subsection (a)(1).

(2) Effect of compliance.--Compliance with the standards adopted under paragraph (1) shall be deemed to satisfy Federal and State statutory requirements for written signatures with respect to the transactions referred to in subsection (a)(1).

(f) Transfer of Information Among Health Plans.--The Secretary shall adopt standards for transferring among health plans appropriate standard data elements needed for the coordination of benefits, the sequential processing of claims, and other data elements for individuals who have more than one health plan.

Sec. 1174. (a) Initial (NOTE: 42 USC 1320d-3.) Standards.--The Secretary shall carry out section 1173 not later than 18 months after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, except that standards relating to claims attachments shall be adopted not later than 30 months after such date.

(b) Additions and Modifications to Standards.-- (1) In general.--Except as provided in paragraph (2), the Secretary shall review the standards adopted under section 1173, and shall adopt modifications to the standards (including additions to the standards), as determined appropriate, but not more frequently than once every 12 months. Any addition or modification to a standard shall be completed in a manner which minimizes the disruption and cost of compliance.

(2) Special rules.-- (A) First 12-month period.--Except with respect to additions and modifications to code sets under subparagraph (B), the Secretary may not adopt any modification to a standard adopted under this part during the 12-month period beginning on the date the standard is initially adopted, unless the Secretary determines that the modification is necessary in order to permit compliance with the standard.

(B) Additions and modifications to code sets.-- (i) In general.--The Secretary shall ensure that procedures exist for the routine maintenance, testing, enhancement, and expansion of code sets.

(ii) Additional rules.--If a code set is modified under this subsection, the modified code set shall include instructions on how data elements of health information that were encoded prior to the modification may be converted or translated so as to preserve the informational value of the data elements that existed before the modification. Any modification to a code set under this subsection shall be implemented in a manner that minimizes the disruption and cost of complying with such modification.

Sec. 1175. (a) Conduct (NOTE: 42 USC 1320d-4.) of Transactions by Plans.-- (1) In general.--If a person desires to conduct a transaction referred to in section 1173(a)(1) with a health plan as a standard transaction-- (A) the health plan may not refuse to conduct such transaction as a standard transaction; (B) the insurance plan may not delay such transaction, or otherwise adversely affect, or attempt to adversely affect, the person or the transaction on the ground that the transaction is a standard transaction; and (C) the information transmitted and received in connection with the transaction shall be in the form of standard data elements of health information.

(2) Satisfaction of requirements.--A health plan may satisfy the requirements under paragraph (1) by-- (A) directly transmitting and receiving standard data elements of health information; or (B) submitting nonstandard data elements to a health care clearinghouse for processing into standard data elements and transmission by the health care clearinghouse, and receiving standard data elements through the health care clearinghouse.

(3) Timetable for compliance.--Paragraph (1) shall not be construed to require a health plan to comply with any standard, implementation specification, or modification to a standard or specification adopted or established by the Secretary under sections 1172 through 1174 at any time prior to the date on which the plan is required to comply with the standard or specification under subsection (b).

(b) Compliance With Standards.-- (1) Initial compliance.-- (A) In general.--Not later than 24 months after the date on which an initial standard or implementation specification is adopted or established under sections 1172 and 1173, each person to whom the standard or implementation specification applies shall comply with the standard or specification.

(B) Special rule for small health plans.--In the case of a small health plan, paragraph (1) shall be applied by substituting `36 months' for `24 months'. For purposes of this subsection, the Secretary shall determine the plans that qualify as small health plans.

(2) Compliance with modified standards.--If the Secretary adopts a modification to a standard or implementation specification under this part, each person to whom the standard or implementation specification applies shall comply

with the modified standard or implementation specification at such time as the Secretary determines appropriate, taking into account the time needed to comply due to the nature and extent of the modification. The time determined appropriate under the preceding sentence may not be earlier than the last day of the 180-day period beginning on the date such modification is adopted. The Secretary may extend the time for compliance for small health plans, if the Secretary determines that such extension is appropriate.

(3) Construction.--Nothing in this subsection shall be construed to prohibit any person from complying with a standard or specification by-- (A) submitting nonstandard data elements to a health care clearinghouse for processing into standard data elements and transmission by the health care clearing- house; or (B) receiving standard data elements through a health care clearinghouse.

Sec. 1176. (a) General (NOTE: 42 USC 1320d-5.) Penalty.-- (1) In general.--Except as provided in subsection (b), the Secretary shall impose on any person who violates a provision of this part a penalty of not more than $100 for each such violation, except that the total amount imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $25,000.

(2) Procedures.--The provisions of section 1128A (other than subsections (a) and (b) and the second sentence of subsection (f)) **shall apply to the imposition of a civil money penalty under this subsection in the same manner as such provisions apply to the imposition of a penalty under such section 1128A.**

(b) Limitations.-- (1) Offenses otherwise punishable.--A penalty may not be imposed under subsection (a) with respect to an act if the act constitutes an offense punishable under section 1177.

(2) Noncompliance not discovered.--A penalty may not be imposed under subsection (a) with respect to a provision of this part if it is established to the satisfaction of the Secretary

that the person liable for the penalty did not know, and by exercising **reasonable diligence** would not have known, that such person violated the provision.

(3) Failures due to reasonable cause.-- (A) In general.--Except as provided in subparagraph (B), a penalty may not be imposed under subsection (a) if-- (i) the failure to comply was due to reasonable cause and not to willful neglect; and (ii) the failure to comply is corrected during the 30-day period beginning on the first date the person liable for the penalty knew, or by exercising reasonable diligence would have known, that the failure to comply occurred.

(B) Extension of period.-- (i) No penalty.--The period referred to in subparagraph (A)(ii) may be extended as determined appropriate by the Secretary based on the nature and extent of the failure to comply.

(ii) Assistance.--If the Secretary determines that a person failed to comply because the person was unable to comply, the Secretary may provide technical assistance to the person during the period described in subparagraph (A)(ii). Such assistance shall be provided in any manner determined appropriate by the Secretary.

(4) Reduction.--In the case of a failure to comply which is due to reasonable cause and not to willful neglect, any penalty under subsection (a) that is not entirely waived under paragraph (3) may be waived to the extent that the payment of such penalty would be excessive relative to the compliance failure involved.

Sec. 1177. (a) **Offense.--A (NOTE: 42 USC 1320d-6.) person who knowingly and in violation of this part-- (1) uses or causes to be used a unique health identifier; (2) obtains individually identifiable health information relating to an individual; or (3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b).**

(b) Penalties.--A person described in subsection (a) shall-- (1) be fined not more than $50,000, imprisoned not more than 1 year, or both; (2) if the offense is committed under false pretenses, be fined not more than $100,000, imprisoned not more than 5 years, or both; and (3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $250,000, imprisoned not more than 10 years, or both.

Sec. 1178. (a) General (NOTE: 42 USC 1320d-7.) Effect.-- (1) General rule.--Except as provided in paragraph (2), a provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1172 through 1174, shall supersede any contrary provision of State law, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.

(2) Exceptions.--A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1172 through 1174, shall not supersede a contrary provision of State law, if the provision of State law-- (A) is a provision the Secretary determines-- (i) is necessary-- (I) **to prevent fraud and abuse;** (II) to ensure appropriate State regulation of insurance and health plans; (III) for State reporting on health care delivery or costs; or (IV) for other purposes; or (ii) addresses controlled substances; or (B) **subject to section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, relates to the privacy of individually identifiable health information.**

(b) Public Health.--Nothing in this part shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention.

(c) State Regulatory Reporting.--Nothing in this part shall limit the ability of a State to require a health plan to report, or to provide access to, information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification.

Sec. 1179. To (NOTE: 42 USC 1320d-8.) the extent that an entity is engaged in activities of a financial institution (as defined in section 1101 of the Right to Financial Privacy Act of 1978), or is engaged in authorizing, processing, clearing, settling, billing, transferring, reconciling, or collecting payments, for a financial institution, this part, and any standard adopted under this part, shall not apply to the entity with respect to such activities, including the following: (1) The use or disclosure of information by the entity for authorizing, processing, clearing, settling, billing, transferring, reconciling or collecting, a payment for, or related to, health plan premiums or health care, where such payment is made by any means, including a credit, debit, or other payment card, an account, check, or electronic funds transfer.

(2) The request for, or the use or disclosure of, information by the entity with respect to a payment described in paragraph (1)-- (A) for transferring receivables; (B) for auditing; (C) in connection with-- (i) a customer dispute; or (ii) an inquiry from, or to, a customer; (D) in a communication to a customer of the entity regarding the customer's transactions, payment card, account, check, or electronic funds transfer; (E) for reporting to consumer reporting agencies; or (F) for complying with-- (i) a civil or criminal subpoena; or (ii) a Federal or State law regulating the entity.".

(b) Conforming Amendments.-- (1) Requirement for Medicare providers.--Section 1866(a)(1) (42 U.S.C. 1395cc(a)(1)) is amended-- (A) by striking and" at the end of subparagraph (P); (B) by striking the period at the end of subparagraph (Q) and inserting ; and"; and (C) by inserting immediately after subparagraph (Q) the following new subparagraph: (R) to contract only with a health care clearinghouse (as defined in section 1171) that meets each standard and implementation specification adopted or established under part C of title XI on or after the date on which the health care clearinghouse is required to comply with the standard or specification.".

(2) Title heading.--Title XI (42 U.S.C. 1301 et seq.) is amended by striking the title heading and inserting the following:

TITLE XI--GENERAL PROVISIONS, PEER REVIEW, AND ADMINISTRATIVE SIMPLIFICATION".

SEC. 263. CHANGES IN MEMBERSHIP AND DUTIES OF NATIONAL COMMITTEE ON VITAL AND HEALTH STATISTICS.

Section 306(k) of the Public Health Service Act (42 U.S.C. 242k(k)) is amended-- (1) in paragraph (1), by striking 16" and inserting 18"; (2) by amending paragraph (2) to read as follows:

(2) The members of the Committee shall be appointed from among persons who have distinguished themselves in the fields of health statistics, electronic interchange of health care information, privacy and security of electronic information, population-based public health, purchasing or financing health care services, integrated computerized health information systems, health services research, consumer interests in health information, health data standards, epidemiology, and the provision of health services. Members of the Committee shall be appointed for terms of 4 years."; (3) by redesignating paragraphs (3) through (5) as paragraphs (4) through (6), respectively, and inserting after paragraph (2) the following:

(3) Of the members of the Committee-- (A) 1 shall be appointed, not later than 60 days after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, by the Speaker of the House of

Representatives after consultation with the Minority Leader of the House of Representatives; (B) 1 shall be appointed, not later than 60 days after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, by the President pro tempore of the Senate after consultation with the Minority Leader of the Senate; and (C) 16 shall be appointed by the Secretary."; (4) by amending paragraph (5) (as so redesignated) to read as follows:

(5) The Committee-- (A) shall assist and advise the Secretary-- (i) to delineate statistical problems bearing on health and health services which are of national or international interest; (ii) to stimulate studies of such problems by other organizations and agencies whenever possible or to make investigations of such problems through subcommittees; (iii) to determine, approve, and revise the terms, definitions, classifications, and guidelines for assessing health status and health services, their distribution and costs, for use (I) within the Department of Health and Human Services, (II) by all programs administered or funded by the Secretary, including the Federal-State-local cooperative health statistics system referred to in subsection (e), and (III) **to the extent possible as determined by the head of the agency involved, by the Department of Veterans Affairs, the Department of Defense, and other Federal agencies concerned with health and health services;** (iv) with respect to the design of and approval of health statistical and health information systems concerned with the collection, processing, and tabulation of health statistics within the Department of Health and Human Services, with respect to the Cooperative Health Statistics System established under subsection (e), and with respect to the standardized means for the collection of health information and statistics to be established by the Secretary under subsection (j)(1); (v) to review and comment on findings and proposals developed by other organizations and agencies and to make recommendations for their adoption or implementation by local, State, national, or international

agencies; (vi) to cooperate with national committees of other countries and with the World Health Organization and other national agencies in the studies of problems of mutual interest; (vii) to issue <<NOTE: Reports.>> an annual report on the state of the Nation's health, its health services, their costs and distributions, and to make proposals for improvement of the Nation's health statistics and health information systems; and (viii) in complying with the requirements imposed on the Secretary under part C of title XI of the Social Security Act; (B) shall study the issues related to the adoption of uniform data standards for patient medical record information and the electronic exchange of such information; (C) shall <<NOTE: Reports.>> report to the Secretary not later than 4 years after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996 recommendations and legislative proposals for such standards and electronic exchange; and (D) shall be responsible generally for advising the Secretary and the Congress on the status of the implementation of part C of title XI of the Social Security Act."; and (5) by adding at the end the following:

(7) (NOTE: Reports.) Not later than 1 year after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, and annually thereafter, the Committee shall submit to the Congress, and make public, a report regarding the implementation of part C of title XI of the Social Security Act. Such report shall address the following subjects, to the extent that the Committee determines appropriate: (A) The extent to which persons required to comply with part C of title XI of the Social Security Act are cooperating in implementing the standards adopted under such part.

(B) The extent to which such entities are meeting the security standards adopted under such part and the types of penalties assessed for noncompliance with such standards.

(C) Whether the Federal and State Governments are receiving information of sufficient quality to meet their responsibilities under such part.

(D) Any problems that exist with respect to implementation of such part.

(E) The extent to which timetables under such part are being met.".

SEC. 264. RECOMMENDATIONS WITH (NOTE: 42 USC 1320d-2 note.) RESPECT TO PRIVACY OF CERTAIN HEALTH INFORMATION.

(a) In General.--Not later than the date that is 12 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall submit to the Committee on Labor and Human Resources and the Committee on Finance of the Senate and the Committee on Commerce and the Committee on Ways and Means of the House of Representatives detailed recommendations on standards with respect to the privacy of individually identifiable health information.

(b) Subjects for Recommendations.--The recommendations under subsection (a) shall address at least the following: (1) The rights that an individual who is a subject of individually identifiable health information should have.

(2) The procedures that should be established for the exercise of such rights.

(3) The uses and disclosures of such information that should be authorized or required.

(c) Regulations.-- (1) In (NOTE: Regulations.) general.--If legislation governing standards with respect to the privacy of individually identifiable health information transmitted in connection with the transactions described in section 1173(a) of the Social Security Act (as added by section 262) is not enacted by the date that is 36 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall promulgate final regulations containing such standards not later than the date that is 42 months after the date of the enactment of this Act. Such regulations shall address at least the subjects described in subsection (b).

(2) Preemption.--A regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation.

(d) Consultation.--In carrying out this section, the Secretary of Health and Human Services shall consult with-- (1) the National Committee on Vital and Health Statistics established under section 306(k) of the Public Health Service Act (42 U.S.C. 242k(k)); and (2) the Attorney General.

Subtitle G--Duplication and Coordination of Medicare-Related Plans

SEC. 271. DUPLICATION AND COORDINATION OF MEDICARE-RELATED PLANS.

(a) Treatment of Certain Health Insurance Policies as Nonduplicative.--Section 1882(d)(3)(A) (42 U.S.C. 1395ss(d)(3)(A)) is amended-- (1) in clause (iii), by striking clause (i)" and inserting clause (i)(II)"; and (2) by adding at the end the following:

(iv) For purposes of this subparagraph, a health insurance policy (other than a Medicare supplemental policy) providing for benefits which are payable to or on behalf of an individual without regard to other health benefit coverage of such individual is not considered to `duplicate' any health benefits under this title, under title XIX, or under a health insurance policy, and subclauses (I) and (III) of clause (i) do not apply to such a policy.

(v) For purposes of this subparagraph, a health insurance policy (or a rider to an insurance contract which is not a health insurance policy) is not considered to `duplicate' health benefits under this title or under another health insurance policy if it-- (I) provides health care benefits only for long-term care, nursing home care, home health care, or community-based care, or any combination thereof, (II) coordinates against or excludes items and services available or paid for under this title or under another health insurance policy, and (III) for policies sold or issued on or after the end of the 90-day period beginning on the date of enactment of the Health Insurance Portability and Accountability Act of 1996 discloses such coordination or exclusion in the policy's outline of coverage.

For purposes of this clause, the terms `coordinates' and `coordination' mean, with respect to a policy in relation to health benefits under this title or under another health insurance policy, that the policy under its terms is secondary to, or excludes from payment, items and services to the extent available or paid for under this title or under another health insurance policy.

(vi)(I) An individual entitled to benefits under part A or enrolled under part B of this title who is applying for a health insurance policy (other than a policy described in subclause (III)) shall be furnished a disclosure statement described in clause (vii) for the type of policy being applied for. Such statement shall be furnished as a part of (or together with) the application for such policy.

(II) Whoever issues or sells a health insurance policy (other than a policy described in subclause (III)) to an individual described in subclause (I) and fails to furnish the appropriate disclosure statement as required under such subclause shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both, and, in addition to or in lieu of such a criminal penalty, is subject to a civil money penalty of not to exceed $25,000 (or $15,000 in the case of a person other than the issuer of the policy) for each such violation.

(III) A policy described in this subclause (to which subclauses (I) and (II) do not apply) is a Medicare supplemental policy or a health insurance policy identified under 60 Federal Register

30880 (June 12, 1995) as a policy not required to have a disclosure statement.

(IV) Any reference in this section to the revised NAIC model regulation (referred to in subsection (m)(1)(A)) is deemed a reference to such regulation as revised by section 171(m)(2) of the Social Security Act Amendments of 1994 (Public Law 103-432) and as modified by substituting, for the disclosure required under section 16D(2), disclosure under subclause (I) of an appropriate disclosure statement under clause (vii).

(vii) The disclosure statement described in this clause for a type of policy is the statement specified under subparagraph (D) of this paragraph (as in effect before the date of the enactment of the Health Insurance Portability and Accountability Act of 1996) for that type of policy, as revised as follows: (I) In each statement, amend the second line to read as follows:

`THIS IS NOT MEDICARE SUPPLEMENT INSURANCE'.

(II) In each statement, strike the third line and insert the following: `Some health care services paid for by Medicare may also trigger the payment of benefits under this policy.'.

(III) In each statement not described in subclause (V), strike the boldface matter that begins `This insurance' and all that follows up to the next paragraph that begins `Medicare'.

(IV) In each statement not described in subclause (V), insert before the boxed matter (that states `Before You Buy This Insurance') the following: `This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance.'.

(V) In a statement relating to policies providing both nursing home and non-institutional coverage, to policies providing nursing home benefits only, or policies providing home care benefits only, amend the sentence that begins `Federal law' to read as follows: `Federal law requires us to inform you that in certain situations this insurance may pay for some care also covered by Medicare.'.

(viii)(I) Subject to subclause (II), nothing in this subparagraph shall restrict or preclude a State's ability to regulate health insurance policies, including any health insurance policy that is described in clause (iv), (v), or (vi)(III).

(II) A State may not declare or specify, in statute, regulation, or otherwise, that a health insurance policy (other than a Medicare supplemental policy) or rider to an insurance contract which is not a health insurance policy, that is described in clause (iv), (v), or (vi)(III) and that is sold, issued, or renewed to an individual entitled to benefits under part A or enrolled under part B `duplicates' health benefits under this title or under a Medicare supplemental policy.".

(b) Conforming Amendments.--Section 1882(d)(3) (42 U.S.C.

1395ss(d)(3)) is amended-- (1) in subparagraph (C)-- (A) by striking with respect to (i)" and inserting with respect to", and (B) by striking , (ii) the sale" and all that follows up to the period at the end; and (2) by striking subparagraph (D).

(c) Transitional (NOTE: 42 USC 1395ss note.) Provision.-- (1) No penalties.--Subject to paragraph (3), no criminal or civil money penalty may be imposed under section 1882(d)(3)(A) of the Social Security Act for any act or omission that occurred during the transition period (as defined in paragraph (4)) and that relates to any health insurance policy that is described in clause (iv) or (v) of such section (as amended by subsection (a)).

(2) Limitation on legal action.--Subject to paragraph (3), no legal action shall be brought or continued in any Federal or State court insofar as such action-- (A) includes a cause of action which arose, or which is based on or evidenced by any act or omission which occurred, during the transition period; and (B) relates to the application of section 1882(d)(3)(A) of the Social Security Act to any act or omission with respect to the sale, issuance, or renewal of any health insurance policy

that is described in clause (iv) or (v) of such section (as amended by subsection (a)).

(3) Disclosure condition.--In the case of a policy described in clause (iv) of section 1882(d)(3)(A) of the Social Security Act that is sold or issued on or after the effective date of statements under section 171(d)(3)(C) of the Social Security Act Amendments of 1994 and before the end of the 30-day period beginning on the date of the enactment of this Act, paragraphs (1) and (2) shall only apply if disclosure was made in accordance with section 1882(d)(3)(C)(ii) of the Social Security Act (as in effect before the date of the enactment of this Act).

(4) Transition period.--In this subsection, the term transition period" means the period beginning on November 5, 1991, and ending on the date of the enactment of this Act.

(d) Effective <<NOTE: 42 USC 1395ss note.>> Date.--(1) Except as provided in this subsection, the amendment made by subsection (a) shall be effective as if included in the enactment of section 4354 of the Omnibus Budget Reconciliation Act of 1990.

(2)(A) Clause (vi) of section 1882(d)(3)(A) of the Social Security Act, as added by subsection (a), shall only apply to individuals applying for-- (i) a health insurance policy described in section 1882(d)(3)(A)(iv) of such Act (as added by subsection (a)), after the date of the enactment of this Act, or (ii) another health insurance policy after the end of the 30-day period beginning on the date of the enactment of this Act.

(B) A seller or issuer of a health insurance policy may substitute, for the disclosure statement described in clause (vii) of such section, the statement specified under section 1882(d)(3)(D) of the Social Security Act (as in effect before the date of the enactment of this Act), without the revision specified in such clause.

Taft-Hartley Act- 1947

SEC. 101. The National Labor Relations Act is hereby amended to read as follows: . . . .

"**SEC. 3**.

(a) The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate….

"**SEC. 7**. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"**SEC. 8**. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein

(i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made; and

(ii) if, following the most recent election held as provided in section 9 (e) the Board shall has certified that at least a majority of the employees eligible to vote in sued election have voted to authorize such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or

(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a). It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce

(A) employees in the exercise of the rights guaranteed in section 7: Provided That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein-or -

(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt" to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain" collectively with an employer, provided it is the representative of his employees subject to the provision of section 9 (a);

"(4) to engage in, or to" induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act; "(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt" to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this

Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) . . . That where there is in effect collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and "confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal" Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . .

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelvemonth period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such |party, and that he does not believe in, and i is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in |respect to such affidavits....

SEC. 301....

(b) Any labor organization which represents employees in an in this industry affecting commerce as defined in this Act and any employer whose activities affect |commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United | States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets....

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an in-, industry or activity affecting commerce, for; any labor organization to engage in, or to e or encourage the employees of any employer to engage in, a strike or a converted refusal in the course of their employment to use, manufacture, process, transport, otherwise handle or work on any goods, articles:, materials, or commodities or to perform any services, where an object thereof is

(l) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person; .

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in an other trade, craft, or class unless such employer is failing to conform to an order of certification of the National Labor Relations Board determining. We bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than hit own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district wherefore the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit....

SEC. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"**SEC. 313**. It is unlawful" for any national rank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or n connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in or a Delegate or Resident Commissioner to Congress are be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. . .

305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from employment, and shall forfeit his civil service status, if any, and shall not be eligible for re employment for three years by the United States or any such agency..

Department of Defense
INSTRUCTION

NUMBER 1205.12
April 4, 1996

Administrative Reissuance Incorporating Chg 1, Apr 16, 1997

ASD(RA)

SUBJECT: Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services

References:

(a) DoD Instruction 1205.12, "Assistance to be Provided Members of the Armed Forces in Exercising Reemployment Rights or Obtaining Employment or Training," January 15, 1969 (hereby canceled)

(b) Chapter 43 of title 38, United States Code

(c) Section 1161 of title 10, United States Code

1. REISSUANCE AND PURPOSE

This Instruction:

1.1 Reissues reference (a) to update implementation policy, assign responsibilities, and prescribe procedures for informing Service members who are covered by the provisions of reference (b) and individuals who apply for uniformed service, of their civilian employment and reemployment rights, benefits and obligations.

1.2 Implements reference (b), which updated, codified and strengthened the civilian employment and reemployment rights and benefits of Service members and individuals who apply for uniformed service, and specifies the obligations of Service members and applicants for uniformed service.

2. APPLICABILITY

This instruction applies to the Office of the Secretary of Defense; the Military Departments, including the Coast

Guard when it is not operating as a Military Service in the Department of the Navy by agreement with the Department of Transportation; the Chairman of the Joint Chiefs of Staff; and the Defense Agencies (hereafter referred to collectively as "the DoD Components"). The term "Military Departments," as used herein, refers to the Departments of the Army, Navy, and Air Force. The term "Secretary concerned" refers to the Secretaries of the Military Departments and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a Service in the Department of the Navy. The term "Military Services' refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

2. DEFINITIONS

Terms used in this Instruction are defined in enclosure 1.

4. POLICY

It is DoD policy to support non-career service by taking appropriate actions to inform and assist uniformed Service members and former Service members who are covered by the provisions of Chapter 43 of 38 U.S.C. (reference (b)), and individuals who apply for uniformed service of their rights, benefits and obligations under reference (b). Such actions include:

4.1 Advising non-career Service members and individuals who apply for uniformed service of their employment and reemployment rights and benefits provided in reference (b), as implemented by this Instruction, and the obligations they must meet to exercise those rights.

4.2 Providing assistance to Service members, former Service members and individuals who apply for uniformed service in exercising employment and reemployment rights and benefits.

4.3 Providing assistance to civilian employers of non-career Service members in addressing issues involving uniformed service as it relates to civilian employment or reemployment.

4.4 Considering requests from civilian employers of members of the National Guard and Reserve to adjust a Service member's scheduled absence from civilian employment because of uniformed service or make other accommodations to such requests, when it is reasonable to do so.

4.5 Documenting periods of uniformed service that are exempt from a Service member's cumulative 5-year absence from civilian employment to perform uniformed service as provided in reference (b) and implemented by this Instruction.

4.6 Providing, at the Service member's request, necessary documentation concerning a period or periods of service, or providing a written statement that such documentation is not available, that will assist the Service member in establishing civilian reemployment rights, benefits and obligations.

5. RESPONSIBILITIES

5.1 The Assistant Secretary of Defense for Reserve Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall:

5.1.1 In conjunction with the Departments of Labor (DoL0 and Veterans Affairs, of the Office of Personnel Management (OPM), and other appropriate Departments and activities of the executive branch, determine actions necessary to establish procedures and provide information concerning civilian employment and reemployment rights, benefits and obligations.

5.1.2. Establish procedures and provide guidance to the Secretaries concerned about civilian employment and reemployment rights, benefits and obligations of Service members who are covered by the provisions of reference (b) and individuals who apply for uniformed service as provided in Chapter 43 of 38 U.S.C. (reference (b)). This responsibility shall be carried out in coordination with DoL, OPM, and the Federal Retirement Thrift Investment Board.

5.1.3. Monitor compliance with reference (b) and this Instruction.

5.1.4. Publish in the Federal Register, DoD policies and procedures established to implement reference (b).

5.2. The Secretaries of the Military Departments and the Commandant of the Coast Guard shall establish procedures to:

5.2.1. Ensure compliance with this Instruction.

5.2.2. Inform Service members who are covered by the provisions of reference (b) and individuals who apply for uniformed service of the provisions of reference (b) as implemented by this Instruction.

5.2.3. Provide available documentation, upon request from a Service member or former Service member, that can be used to establish reemployment rights of the individual.

5.2.4. Specify, as required, and document those periods of active duty that are exempt from the 5-year cumulative service limitation that a Service member may be absent from a position of civilian employment while retaining reemployment rights.

5.2.5. Provide assistance to Service members and former Service members who are covered by the provisions of reference (b), and individuals who apply for uniformed service in exercising employment and reemployment rights.

5.2.6. Provide assistance, as appropriate, to civilian employers of Service members who are covered by the provisions of reference (b) and individuals who apply for uniformed service.

5.2.7. Cooperate with the DoL in discharging its responsibilities to assist persons with employment and reemployment rights and benefits.

5.2.8. Cooperate with OPM in carrying out its placement responsibilities under reference (b).

6. PROCEDRUES

The Secretaries of the Military Departments and the Commandant of the Coast Guard shall:

6.1. Inform individuals who apply for uniformed service and members of a Reserve component who perform or participate on a voluntary or involuntary basis in active duty, active duty for special work, initial active duty for training, active duty for training, inactive duty training, annual training and full-time National Guard duty, of their employment and reemployment rights, benefits, and obligations as provided under Chapter 43 of 38 U.S.C. (reference (b)) and described in enclosure 2. Other appropriate materials may be used to supplement the information contained in enclosure 2.

6.1.1. Persons who apply for uniformed service shall be advised that DoD strongly encourages applicants to provide advance notice in writing to their civilian employers of pending uniformed service or any absence for the purpose of an examination to determine the person's fitness to perform uniformed service. Providing written advance notice is preferable to verbal advance notice since it is easier to establish that this basic prerequisite to retaining reemployment rights was fulfilled. Regardless of the means of providing advance notice, whether verbal or written, it should be provided as early as practicable.

6.1.2. Annually and when ever called to duty for a contingency operation, advise Service members who are participating in a Reserve component of:

6.1.2.1. The requirement to provide advance written or verbal notice to their civilian employers for each period of military training, active and inactive duty, or full-time National Guard duty.

6.1.2.1.1. Reserve component members shall be advised that DoD strongly encourages that they provide advance notice to their civilian employers in writing for each period of pending uniformed service. Providing written advance notice is preferable to verbal advance notice since it easily establishes that this prerequisite to retaining reemployment rights was fulfilled.

6.1.2.1.2. Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. DoD strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so.

6.1.2.1.3. The advance notice requirement can be met by providing the employer with a copy of the unit annual training schedule or preparing a standardized letter. The ample employer notification letter in enclosure 3 may be used for this purpose.

6.1.2.2. The 5-year cumulative limit on absences from their civilian employment due to uniformed service and exemptions to that limit.

6.1.2.3. The requirements for reporting or submitting application to return to their position of civilian employment.

6.1.2.4. Their general reemployment rights and benefits.

6.1.2.5. The option for continuing employer-provided health care, if the employer provides such a benefit.

6.1.2.6. The opportunity to use accrued leave in order to perform uniformed service.

6.1.2.7. Who they may contact to obtain assistance with employment and reemployment questions and problems.

6.2. Inform Service members who are covered by the provisions of Chapter 43 of 38 U.S.C. (reference (b)), upon completion of an extended period of active duty and before separation from active duty of their employment and reemployment rights, benefits, and obligations as provided under reference (b). This shall, as a minimum, include notification and reporting requirements for returning to employment with their civilian employer. While enclosure 2 provides the necessary information to satisfy this requirement, other appropriate materials may be used to supplement this information.

6.3. Issue orders that span the entire period of service when ordering a member of the National Guard or Reserve to active duty for a mission or requirement. Order modifications shall be initiated, as required, to ensure continuous active duty should be period required to complete the mission or requirement change.

6.4. Document the length of a Service member's initial period of military service obligation performed on active duty.

6.5. Determine and certify in writing those additional training requirements not already exempt for the 5-year cumulative service limit which are necessary for the professional development, or skill training or retraining for members of the National Guard or Reserve. Once the Secretary concerned certifies those training requirements, performance of uniformed service to complete a certified training requirement is exempt from the 5-year cumulative service limit.

6.6. Determine those periods of active duty when a Service member is ordered to, or retained on, active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or Congress. If the purpose of the order to, or retention on, active duty is for the direct or in direct support of the war or national emergency, then the orders of the Service member should be so annotated, since that period of service is exempt from the 5-year cumulative service limit established in reference (b).

6.7. Determine those periods of active duty performed by a member of the National Guard or Reserve that are designated by the Secretary concerned as a critical mission or critical requirement, and for that reason are exempt from the 5-year cumulative service limit. The authority for determining what constitutes a critical mission or requirement shall not be delegated below the Assistant Secretary level or the Commandant of the Coast Guard. The designation of a critical requirement to gain the necessary experience to qualify for key senior leadership positions shall be used judiciously, and the necessary experience and projected key leadership positions fully documented. This authority shall not be used to grant exemptions to avoid the cumulative 5-year service limit established by reference (b) or to extend individuals in repeated statutory tours. The Assistant Secretary of Defense for Reserve Affairs shall be notified in writing of all occasions in which a Service member is granted more than one exemption for a critical requirement when the additional exemption(s) extend the Service member beyond the 5-year cumulative service limit established in reference (b).

6.8. When appropriate, ensure that orders to active duty or orders retaining members on active duty specify the statutory or Secretarial authority for those orders when such authority meets one or more of the exemptions from the 5-year cumulative service limit provided in reference (b). If circumstances arise that prevent placing this authority on the orders, the authority shall be included in a separation document and retained in the Service member's personnel file.

6.9. Ensure that appropriate documents verifying any period of service exempt from the 5-year cumulative service limit are placed in the Service member's personnel record or other appropriate record.

6.10. Document those circumstances that prevent a Service member from providing advance notification of uniformed service to a civilian employer because of military necessity or when advance notification is otherwise impossible or unreasonable, as defined in enclosure 1.

6.11. Designate those officers, as defined in paragraph E1.1.7. of enclosure 1, below, who are authorized by the Secretary concerned to provide advance notification of service to a civilian employer on behalf of a Service member or applicant for uniformed service.

6.12. Provide documentation, upon request from a Service member or former Service member, that may be used to satisfy the Service member's entitlement to statutory reemployment rights and benefits. Appropriate documentation may include, as necessary:

6.12.1. The inclusive dates of the initial period of military service obligation performed on active duty.

6.12.2. Any period of service during which a Service member was required to serve because he or she was unable to obtain a release from active duty through no fault of the Service member.

6.12.3. The cumulative length of all periods of active duty performed.

6.12.4. The authority under which a Service member was ordered to active duty when such service was exempt from the 5-year cumulative service limit.

6.12.5. The date the Service member was last released from active duty, active duty for special work initial active duty for training, active duty for training, inactive duty training, annual training or full-time National Guard duty. This documentation establishes the timeliness of reporting to, or submitting application to return to, a position of civilian employment.

6.12.6. Whether service requirements prevent providing a civilian employer with advance notification of pending service.

6.12.7. That the Service member's entitlement to reemployment benefits has not been terminated because of the character of service as provided in Section 4304 of 38 U.S.C. (reference (b)).

6.12.8. When appropriate, a statement that sufficient documentation does not exist.

6.13. Establish a central point of contact at a headquarters or regional command who can render assistance to active duty Service members and applicants for uniformed service about employment and reemployment rights, benefits and obligations.

6.14. Establish points of contact in each Reserve component headquarters or Reserve regional command, and each National Guard State headquarters who can render assistance to:

6.14.1. Members of the National Guard or Reserve about employment and reemployment rights, benefits and obligations.

6.14.2. Employers of National Guard and Reserve members about duty or training requirements arising from a member's uniformed service or service obligation.

6.15. A designated Reserve component representative shall consider, and accommodate when it does not conflict with military requirements, a request from a civilian employer of a National Guard and Reserve member to adjust a Service member's absence from civilian employment due to uniformed service when such service has an adverse impact on the employer. The representative may make arrangements other than adjusting the period of absence to accommodate such a request when it serves the best interest of the military and is reasonable to do so.

7. EFFECTIVE DATE

This Instruction is effective immediately.

s/EDWIN DORN
UNDER SECRETARY OF DEFENSE FOR
PERSONNEL AND READINESS

Enclosures – 3

E1. Definitions

E2. Civilian Employment and Reemployment Rights, Benefits and Obligations for Applicants for, and Service Members and Former Service Members of the Uniformed Services

E3. Sample Employer Notification of Uniformed Service

E1. ENCLOSURE 1

DEFINITIONS

E1.1.1. Critical Mission. An operational mission that requires the skills or resources available in a Reserve competent or components.

E1.1.2. Critical Requirement. A requirement in which the incumbent possesses unique knowledge, extensive experience, and specialty skill training to successfully fulfill the duties of responsibilities in support of the mission, operation or exercise. Also, a requirement in which the incumbent must gain the necessary experience to qualify for key senior leadership positions within his or her Reserve component.

E1.1.3. Escalator Position. This is established by the principle that the returning Service member is entitled to the position of civilian employment that he or she would have attained had he or she remained continuously employed by that civilian employer. This may be a position of greater or lesser responsibilities, to include a layoff status, when compared to the employees of the same seniority and status employed by the company.

E1.1.4. Impossible or Unreasonable. For the purpose of determining when providing advance notice of uniformed service to an employer is impossible or unreasonable, the unavailability of an employer or employer representative to whom notification can be given, an order by competent military authority to report for uniformed service within forty-eight hours of notification, or other circumstances that the Office of the Assistant Secretary of Defense for Reserve

Affairs may determine are impossible or unreasonable are sufficient justification for not providing advance notice of pending uniformed service to an employer.

E1.1.5. Military Necessity. For the purpose of determining when providing advance notice of uniformed service is not required. A mission, operation, exercise or requirement that is classified, or a pending or ongoing mission, operation, exercise or requirement that may be compromised or otherwise adversely affected by public knowledge is sufficient justification for not providing advance notice to an employer.

E1.1.6. Non-Career Service. The period of active uniformed service required to complete the initial uniformed service obligation; a period of active duty or full-time National Guard duty that is for a specified purpose and duration with no expressed or implied commitment for continued active duty; or participation in a Reserve component as a member of the Ready Reserve performing annual training, active duty for training or inactive duty training. Continuous or repeated active uniformed service or full-time National Guard duty that results in eligibility for a regular retirement from the Armed Forces is not considered non-career service.

E1.1.7. Officer. For determining those Service officials authorized to provide advance notice to a civilian employer of pending uniformed service by a Service member or an individual who has applied for uniformed service an officer shall include all commissioned officers, warrant officers, and non-commissioned officers authorized by the Secretary concerned to act in this capacity.

E1.1.8. Uniformed Service. Performance of duty on a voluntary or involuntary basis in the Army, the Navy, the Air Force, the Marine Corps or the Coast Guard, including their Reserve components, when the Service member is engaged in active duty, active duty for special work, active duty for training, initial active duty for training, inactive duty training, annual training or full-time National Guard duty, and, for purposes of this instruction, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform such duty.

E2. ENCLOSURE 2

CIVILIAN EMPLOYMENT AND REEMPLOYMENT RIGHTS, BENEFITS AND OBLIGATIONS FOR APPLICANTS FOR, AND SERVICE MEMBERS AND FORMER SERVICE MEMBERS OF THE UNIFORMED SERVICES

E2.1. SCOPE OF COVERAGE

E2.1.1. The Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified in Chapter 43 of 38 U.S.C. (reference (b)) provides protection to anyone absent from a position of civilian employment because of uniformed service if:

E2.1.1.1. Advance written or verbal notice was given to the civilian employer.

E2.1.1.1.1. Advance notice is not required if precluded by military necessity, or is otherwise unreasonable or impossible.

E2.1.1.1.2. DoD strongly encourages Service members and applicants for service to provide advance notice to their civilian employer in writing for each period of pending uniformed service. Providing written advance notice is preferable to verbal advance notice since it easily establishes that this prerequisite to retaining reemployment rights was fulfilled. Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. Also, DoD strongly recommends that Reserve component members provide advance notice to their civilian employers at least 30 days in advance when it is feasible to do so. The advance notice requirement can be met by providing the employer with a copy of the unit annual training schedule or preparing a standardized letter. The sample employer notification letter in enclosure 3 may be used for this purpose;

E2.1.1.2. The cumulative length of absences does not exceed 5 years;

E2.1.1.3. The individual reports to, or submits an application for reemployment, within the specified period based on duration of service as described in section E2.4., below; and,

E2.1.1.4. The person's character of service was not disqualifying as described in paragraphs E2.1.2.4. and E2.1.2.5., below.

E2.1.2. A civilian employer is not required to reemploy a person if:

E2.1.2.1. The civilian employment was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

E2.1.2.2. The employer's circumstances have so changed as to make reemployment impossible or unreasonable.

E2.1.2.3. The reemployment imposes an undue hardship on the employer in the case of an individual who:

E2.1.2.3.1. Has incurred a service-connected disability; or,

E2.1.2.3.2. Is not qualified for the escalator position or the position last held, and cannot become qualified for any other position of lesser status and pay after a reasonable effort by the employer to qualify the person for such positions.

E2.1.2.4. The Service member or former Service member was separated form a uniformed service with a dishonorable or bad conduct discharge, or separated from a uniformed service under other than honorable conditions.

E2.1.2.5. An officer dismissed from any Armed Force or dropped from the rolls of any Armed Force as prescribed under Section 1161 of 10 U.S.C. (reference ©).

E2.1.2.6. The cumulative length of service exceeds five years and no portion of the cumulative five years of uniformed service falls within the exceptions described in section E2.3., below.

E2.1.2.7. An employer asserting that he or she is not required to reemploy an individual because the employment was for a brief, non-recurrent period, or reemployment is impossible or unreasonable, or reemployment imposes an undue hardship on the employer, that employer has the burden of proving his or her assertion.

E2.1.3. Entitlement to protection under Chapter 43 of 38 U.S.C. 9reference (b)) does not depend on the timing, frequency, and duration of training or uniformed service.

E2.2. PROHIBITION AGAINST DISCRIMINATION AND ACTS OF REPRISAL

E2.2.1. A person who is a member of , applies to be a member of, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not e denied initial employment, reemployment retention in employment, promotion, or any employment benefit by an employer on the basis of that membership, and application for membership, performance of service, or an obligation for service in the uniformed services.

E2.2.2. A person, including a non-Service member, shall not be subject to employment discrimination or any adverse employment action because he or she has taken an action to enforce a protection afforded a Service member, has testified or made a statement in or in connection with any proceeding concerning employment and reemployment rights of a Service member, has assisted or participated in an investigation, or has otherwise exercised any right provided by reference (b).

E2.2.3. An employer shall be considered to have engaged in an act of discrimination if an individual's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, performance of service, application for service or obligation.

E2.3. EXCEPTIONS TO THE MASIMUM PERIOD OF SERVICE FOR COVERAGE

In order to retain reemployment rights and benefits provided by Chapter 43 of 38 U.S.C. (reference (b)), the cumulative length of absences from the same employer cannot exceed 5 years. Not counted toward this limit is:

E2.3.1. Service beyond 5 years if required to complete an initial service obligation;

E2.3.2. Service during which an individual was unable to obtain release orders before the expiration of the 5-year cumulative service limit through no fault of his or her own;

E2.3.3. Inactive duty training; annual training; ordered to active duty for unsatisfactory participation; active duty by National Guardsmen for encampments, maneuvers, field operations or coastal defense; or to fulfill additional training requirements, as determined by the Secretary concerned, for professional skill development, or to complete skill training or retraining;

E2.3.4. Involuntary order or call to active duty, or retention on active duty;

E2.3.5. Service resulting from an order to, or retention on, active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or Congress, as determined by the Secretary concerned;

E2.3.6. Ordered to active duty in support of an operational mission for which personnel have been involuntarily called to active duty;

E2.3.7. Performing service in support of a critical mission or requirement, as determined by the Secretary concerned;

E2.3.8. Performing service in the National Guard when ordered to active duty by the President to suppress an insurrection or rebellion, repel an invasion, or execute laws of the United States; and,

E2.3.9. Voluntary recall to active duty of retired regular Coast Guard officers or retired enlisted Coast Guard members.

E2.4. APPLICATIONS FOR REEMPLOYMENT

E2.4.1. For service of 30 days or less, or for an absence for an examination to determine the individual's fitness to perform uniformed service, the Service member or applicant must report to work not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of service or the examination, after allowing for an eight-hour rest period following safe transportation to his or her residence.

E2.4.2. For service of 31 days or more but less than 181 days, the Service member must submit application for reemployment not later than 14 days after completion of service, or by the next full calendar day when submitting an application within the 14-day limit was impossible or unreasonable through no fault of the Service member.

E2.4.3. For service of 181 days or more, the Service member must submit an application for reemployment not later than 90 days after the completion of service.

E2.4.4. If hospitalized or convalescing from an illness or injury incurred or aggravated during service, the Service member must, at the end of the period necessary for recovery, follow the same procedures, based on length of service, as described in subsections E2.4.1. through E2.3.2., above. The period of hospitalization or convalescence may not normally exceed 2 years.

E2.4.5. Anyone who fails to report or apply for reemployment within the specified period shall not automatically forfeit entitlement to reemployment rights and benefits, but is subject to the rules of conduct, established policies, and general practices of the employer pertaining to explanations and disciplined because of an absence from scheduled work.

E2.5. DOCUMENTATION UPON RETURN

E2.5.1. If service is for 31 days or more, a Service member must provide documentation, upon request from the employer, that establishes:

E25.1.1. He or she made application to return to work within the prescribed time period;

E2.5.1.3. His or her reemployment rights were not terminated because of character of service as described in paragraphs E2.4. and E2.5., above.

E2.5.2. Failure to provide documentation cannot serve as a basis for denying reemployment to the Service member, former Service member, or applicant if documentation does not exist or is not readily available at the time of the employer's request. However, if after reemployment, documentation becomes available that establishes that the Service member or former Service member does not meet one or more of the requirements contained in subsection E2.5.1., above, the employer may immediately terminate the employment.

E2.6. POSITION TO WHICH ENTITLED UPON REEMPLOYMENT

E2.6.1. Reemployment position for service of 90 days or less:

E2.6.1.1. The position the person would have attained if continuously employed (the "escalator" position) and if qualified to perform the duties; or,

E2.6.1.2. The position in which the person was employed in when he or she departed for uniformed service, but only if the person is not qualified to perform the duties of the escalator position, despite the employer's reasonable efforts to qualify the person for the escalator position.

E2.6.2. Reemployment position for service of 91 days or more:

E2.6.2.1. The escalator position, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or,

E2.6.2.2. The position in which the person was employed in when he or she departed for uniformed service or a position of like seniority, status and pay, the duties of which the person is qualified to perform, but only if the person is not qualified to perform the duties of the escalator position after the employer has made a reasonable effort to qualify the person for the escalator position.

E2.6.3. If a person cannot become qualified, after reasonable efforts by the employer to qualify the person, for either the escalator position or the position formerly occupied by the employee as provided in subsections E2.6.1. and E2.6.2., above, for any reason (other than disability), the person must be employed in any other position of lesser status and pay that the person is qualified to perform, with full seniority.

E2.7. POSITION TO WHICH ENTITLED IF DISABLED

If a person who is disabled because of service and cannot (after reasonable efforts by the employer to accommodate the disability) be employed in the escalator position, he or she must be reemployed:

E2.7.1. In any other position that is equivalent to the escalator position in terms of seniority, status, and pay that the person is qualified or can become qualified to perform with reasonable efforts by the employer; or,

E2.7.2. In a position, consistent with the person's disability, that is the nearest approximation to the position in terms of seniority, status, and pay to the escalator or equivalent position.

E2.8. REEMPLOYMENT BY THE FEDERAL GOVERNMENT

E2.8.1. A person who was employed by a Federal Executive Agency when he or she departed for uniformed service must be reemployed using the same order of priorities as prescribed in sections E2.6. and E2.7., above, as appropriate. If the Director of OPM determines that the Federal Executive Agency that employed the person no longer exists and the functions have not been transferred to another Federal Executive Agency, or it is impossible or unreasonable for the Agency to reemploy the person, the Director of OPM shall identify a position of like seniority, status, and pay at another Federal Executive Agency that satisfies the reemployment criteria established for private sector employers, sections E2.6. and E2.7., above, and for which the person is qualified and ensure that the person is offered such position.

E2.8.2. If a person was employed by the Judicial Branch or the Legislative Branch of the Federal Government when he or she departed for uniformed service and the employer determines that it is impossible or unreasonable to reemploy the person, the Director of OPM shall, upon application by the person, ensure that an offer of employment in a Federal Executive Agency is made.

E2.8.3. If the Adjutant General of a State determines that it is impossible or unreasonable to reemploy a person who was employed as a National Guard technician, the Director of OPM shall, upon application by the person ensure that an offer of employment in a Federal Executive Agency is made.

E2.9. REEMPLOYMENT BY CERTAIN FEDERAL AGENCIES

E2.9.1. The heads of the Federal Bureau of Investigation the Central Intelligence Agency, the Defense Intelligence Agency, the Central Imagery Office, the national Security Agency, and, as determined by the President, any Executive Agency or unit thereof, the principal function of which is to conduct foreign intelligence or counterintelligence activities, shall prescribe procedures for reemployment rights for their Agency that are similar to those prescribed for private and other Federal Agencies.

E2.9.2. If an appropriate officer of an Agency referred to in subsection E2.9.1., above, determines that reemployment of a person who was an employee of that Agency when he or she departed for uniformed service is impossible or unreasonable, the Agency shall notify the person and the Director of OPM. The Director OPM shall, upon application by that person, ensure that the person is offered employment in a position in a Federal Executive Agency.

E2.10. GENERAL RIGHTS AND BENEFITS

E2.10.1. A person who is reemployed under Chapter 43 of 38 U.S.C. (reference (b)) is entitled to the seniority, and other rights and benefits determined by seniority that the person had upon commencing uniformed service, and any additional seniority, and rights and benefits he or she would have attained if continuously employed.

E2.10.2. A person who is absent by reason of uniformed service shall be deemed to be on furlough or leave of absence from his or her civilian employer and is entitled to such other rights and benefits not determined by seniority as generally provided by the employer to employees on furlough or leave of absence having similar seniority, status and pay who are also on furlough or leave of absence, as provided under a contract, policy, agreement, practice or plan in effect during the Service member's absence because of uniformed service.

E2.10.3. The individual may be required to pay the employee cost, if any, of any funded benefit continued to the same extent other employees on furlough or leave of absence are required to pay.

E2.11. LOSS OF RIGHTS AND BENEIFTS

If, after being advised by his or her employer of the specific rights and benefits to be lost, a Service member, former Service member or applicant of uniformed service knowingly provided written notice of intent not to seek reemployment after completion of uniformed service, he or she is no longer entitled to any nonseniority-based rights and benefits. This includes all nonseniority-based rights and benefits provided under any contract, plan, agreement, or policy in effect at the time of entry into uniformed service or established while performing such service, and are generally provided by the employer to employees having similar seniority, status and pay who are on furlough or leave of absence.

E2.12. RETENTION RIGHTS

A person who is reemployed following uniformed service cannot be discharged from employment, except for cause:

E2.12.1. Within 1 year after the date of reemployment if that person's service was 181 days or more; or,

E2.12.2. Within 180 days after the date of reemployment if such service was 31 days or more but less than 181 days.

E2.13. ACCRUED LEAVE

During any period of uniformed service, a person may, upon request, use any vacation, annual leave, or similar leave with pay accrued before the commencement of that period of service.

E2.14. HEALTH PLANS

An employer who provides employee health plan coverage, including group health plans, must allow the Service member to elect to continue personal coverage, and coverage for his or her dependents under the following circumstances:

E2.14.1. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of: (1) the 18-month period beginning on the date on which the person's absence begins; or (2) the day after the date on which the person was required to apply for or return to a position of employment as specified in section E2.4., above, and failed to do so.

E2.14.2. A person who elects to continue health plan coverage may be required to pay up to 102 percent of the full premium under the plan, except a person on active duty for 30 days or less cannot be required to pay more than the employee's share, if any, for the coverage.

E2.14.3. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment if one would not have been imposed had coverage not been terminated because of service. However, an exclusion or waiting period may be imposed for coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, the performance of uniformed service.

E2.15. EMPLOYEE PENSION BENEFIT PLANS

E2.15.1. This section applies to individuals whose pension benefits are not provided by the Federal Employees' Retirement System (FERS) or the Civil Service Retirement System (CSRS), or an right provided under any Federal or State law governing pension benefits for government employees.

E2.15.2. A person reemployed after uniformed service shall be treated as if no break in service occurred with the employer(s) maintaining the employee's pension benefit plan. Each period of uniformed service, upon reemployment, shall be deemed to constitute service with the employer(s) for the purpose of determining the nonforfeitability of accrued benefits and accrual of benefits.

E2.15.3. An employer reemploying a Service member or former Service member under Chapter 43 of 38 U.S.C (reference (b)) is liable to the plan for funding any obligation attributable to the employer of the employee's pension benefit plan that would have been paid to the plan on behalf of that employee but for his or her absence during a period of uniformed service.

E2.15.4. Upon reemployment, a person has three times the period of military service, but not to exceed five years after reemployment, within which to contribute the amount he or she would have contributed to the pension benefit plan if he or she had not been absent for uniformed service. He or she is entitled to accrue benefits of the pension plan that are contingent on the making of, or are deprived from, employee contributions or elective deferrals only to the extent the person makes payment to the plan.

E2. 16. FEDERAL EMPLOYEES' RETIRMENT SYSTEM (FERS)

E2.16.1. Federal employees enrolled in FERS who are reemployed with the Government are allowed to make up contributions to the Thrift Savings Fund over a period specified by the employee. However, the makeup period may not be shorter than two times nor longer than four times the period of absence for uniformed service.

E2.16.2. Employees covered by the FERS are entitled to have contributions made to the Thrift Savings Fund on their behalf by the employing Agency for their period of absence in an amount equal to one percent of the employee's basic pay. If an employee covered by FERS makes contributions, the employing Agency must make matching contributions on the employee's behalf.

E2.16.3. The employee shall be credited with a period of civilian service equal to the period of uniformed service, and the employee may elect, for certain purposes, to have his or her separation treated as if it had never occurred.

E2.16.4. This benefit applies to any employee whose release from uniformed service discharge from hospitalization, or other similar event make him or her eligible to seek reemployment under reference (b) on or after August 2, 1990.

E2.16.5. Additional information about Thrift Savings plan (TSP) benefits is available in TSP Bulletins 95-13 and 95-20. A fact sheet is included in TSP Bulletin 95-20, which describes benefits and procedures for eligible employees. Eligible employees should contact their personnel office for information and assistance.

E2.17 CIVIL SERVICE RETIREMENT SYSTEM (CSRS)

E2.17.1. Employees covered by CSRS may make up contributions to the TSP, as in subsection E2.16.1., above. However, no employer contributions are made to the TSP account of CSRS employees.

E2.17.2. This benefit applies to any employee whose release from uniformed service, discharge from hospitalization, or other similar event make him or her eligible to seek reemployment under Chapter 43 of 38 U.S.C. (reference (b)) on or after August 2, 1990.

E2.17.3. Additional information about TSP benefits is available in TSP Bulletins 95-13 and 95-20. A fact sheet is included in TSP Bulletin 95-20, which describes benefits and procedures for eligible employees. Eligible employees should contract their personnel office for information and assistance.

E2.18. INFORMATION AND ASSISTANCE

Information and informal assistance concerning civilian employment and reemployment is available through the National Committee for Employer Support of the Guard and

Reserve (NCESGR). NCESGR representatives can be contacted by calling 1-800-336-4590.

E2.19. ASSISTANCE IN ASSERTING CLAIMS

E2.19.1. A person may file a complaint with the Secretary of Labor if an employer, including any Federal Executive Agency or OPM, has failed or refused, or is about to fail or refuse, to comply with employment or reemployment rights and benefits. The complaint must be in writing, and include the name and address of the employer, and a summary of the allegations(s).

E2.19.2. The Secretary of labor shall investigate each complaint and, if it is determined that the allegations(s) occurred, make reasonable efforts to ensure compliance. If these efforts are unsuccessful, the Secretary of Labor shall notify the complainant of the results and advise the complainant of his or her entitlement to pursue enforcement.

E2.19.3. The Secretary of Labor shall, upon request, provide technical assistance to a claimant and, when appropriate, to the claimant's employer.

E2.20. ENFORCEMENT

E2.20.1. State or Private Employers

E2.20.1.1. A person may request that the Secretary of Labor refer a complaint to the Department of Justice. If the Department of Justice is reasonably satisfied that the person is entitled to the rights or benefits sought, the Department of Justice may appear on behalf of, and act as attorney for, the complainant, and commerce as action for appropriate relief, or the individual may commence an action on his or her own behalf in the appropriate Federal district court.

E2.20.1.2. The district court hearing the complaint can require the employer to:

E2.20.1.2.1. Comply with the law;

E2.20.1.2.2. Compensate the person for any loss of wages or benefits suffered; and, E2.20.1.2.3. A person may file a private suit against an employer without the Secretary of Labor's assistance if he or she;

E2.20.1.3. A person may file a private suit against an employer without the Secretary of Labor's assistance if he or she:

E2.20.1.3.1. Has chosen not to seek the Secretary's assistance;

E2.20.1.3.2. Has chosen not to request that the Secretary refer the complaint to the Department of Justice; or

E2.20.1.3.3. Has refused the Department of Justice's representation of his or her complaint.

E2.20.1.4. No fees or court costs shall be charged or taxed against any person filing a claim. The court may award the person who prevails reasonable attorney fees, expert witness fees, and other litigation expenses.

E2.20.2. Federal Government as the Employer

E2.20.2.1. The same general enforcement procedures established for private employers are applied to Federal Executive Agencies as an employer, however if unable to resolve the complaint, the Secretary of Labor shall refer the complaint to the Office of Special Counsel, which shall represent the individual in a hearing before the Merit Systems Protection Board if reasonably satisfied that the individual is entitled to the rights and benefits sought. The claimant also has the option of directly filing a complaint with the Merit System Protection Board on his or her own behalf.

E2.20.2.2. A person who is adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision.

E2.20.3. Federal Intelligence Agency as the Employer. An individual employed by a Federal Intelligence

Agency listed in subparagraph E2.9.1., above, may submit a claim to the Inspector General of the Agency.

E3. ENCLOSURE 3

SAMPLE EMPLOYER NOTIFICATION OF UNIFORMED SERVICE

This is to inform you that (insert applicant or Service member's name) must report for military training or duty on (insert date). My last period of work will be on (insert date), which will allow me sufficient time to report for military duty. I will be absent from my position of civilian employment for approximately (enter expected duration of duty as specified on your orders, and include the applicable period you have to return or submit notification of your return of work) while performing military training or duty unless extended by competent military authority or delayed by circumstances beyond my control. I otherwise expect to return to work on (insert date).

____

Signature and date

____

Employer acknowledgment and date

EXCERPT
FROM
DOD 5200.2-R, JANUARY 1987
C3. CHAPTER 3

C3.1. SENSITIVE POSITIONS

C3.1.1. Designation of Sensitive Positions. Certain civilian positions within the Department of Defense entail duties of such a sensitive nature including access to classified information that the misconduct, malfeasance, or nonfeasance of an incumbent in any such position could result in an unacceptably adverse impact upon the national security. These positions are referred to in this Regulation as sensitive positions. It is vital to the national security that great care be exercised in the selection of individuals to fill such positions. Similarly, it is important that **only positions which truly meet one or more** of the criteria set forth in paragraph C3.12., below, be designated as sensitive.

C31.2. Criteria for Security Designation of Positions. Each civilian position within the Department of Defense shall be categorized, with respect to security sensitivity, **as either nonsensitive, noncritical-sensitive, or critical-sensitive.**

C3.1.2.1. The criteria to be applied in designating a position as sensitive are:

C3.1.2.1.1. Critical-sensitive

C3.1.2.1.1.1. Access to Top Secret information.

C3.1.2.1.1.2. Development or approval of plans, policies, or programs that affect the overall operations of the Department of Defense or of a DoD Component.

C3.1.2.1.1.3. Development or approval of war plans, plans or particulars of future major or special operations of war, or critical and extremely important items of war.

C3.1.2.1.1.4. Investigative and certain investigative support duties, the issuance of personnel security clearances or access authorizations, or the making of personnel security determinations.

C3.1.2.1.1.5. Fiduciary, public contact, or other duties demanding the highest degree of public trust.

C3.1.2.1.1.6. Duties falling under Special Access programs.

C3.1.2.1.1.7. Category I automated data processing (ADP) positions.

C3.1.2.1.1.8. Any other position so designated by the Head of the DoD Component or designee.

C3.1.2.1.2. Noncritical-sensitive

C3.1.2.1.2.1. Access to Secret or Confidential information.

C3.1.2.1.2.2. Security police/provost marshal-type duties involving the enforcement of law and security duties involving the protection and safeguarding of DoD personnel and property.

C3.1.2.1.2.3. Category II automated data processing positions.

C3.1.2.1.2.4. Duties involving education and orientation of DoD personnel.

C3.1.2.1.2.5. Duties involving the design, operation, or maintenance of intrusion detection systems deployed to safeguard DoD personnel and property.

C3.1.2.1.2.6. Any other position so designated by the Head of the DoD Component or designee.

C3.1.2.2. All other positions shall be designated as nonsensitive.

C3.1.3. Authority to Designate Sensitive Positions. The authority to designate sensitive positions is limited to those authorities designated in paragraph AP5.7., Appendix 5. These authorities shall designate each position within their jurisdiction as to its security sensitivity and maintain these designations current vis-à-vis the specific duties of each position.

C3.1.4. Limitation of Sensitive Positions. It is the responsibility of those authorities authorized to designate sensitive positions to insure that (1) only those positions are designated as sensitive that meet the criteria of paragraph C3.1.2. above and (2) that the designation of sensitive positions is held to a minimum consistent with mission requirements. **Designating authorities shall maintain an accounting of the number of sensitive positions by category, i.e., critical or non-critical sensitive. Such information will be included in annual report required in Chapter 9.**

C3.1.5. Billet Control System for Top Secret

C3.1.5.1. To standardize and control the issuance of Top Secret clearances within the Department of Defense, a specific designated billet must be established and maintained for all DoD military and civilian positions requiring access to Top Secret information. **Only persons occupying these billet positions will be authorized a Top Secret clearance. If an individual departs from a Top Secret billet to a billet/position involving a lower level clearance, the Top Secret clearance will be administratively rescinded.** This Top Secret billet requirement is in addition to the existing billet structure maintained for SCI access.

C3.1.5.2. Each request to DIS for a BI or SBI that involves access to Top Secret or SCI information **will require inclusion of the appropriate billet reference, on the request for investigation.** Each Component head should incorporate, to the extent feasible, the Top Secret billet structure into the component Manpower Unit Manning Document. Such a procedure should minimize the time and effort required to maintain such a billet structure.

C3.1.5.3. **A report on the number of established Top Secret billets will be submitted each year to the**

DUSD(P) as part of the annual clearance report referred to in Chapter 11.

....

EXCERPT
FROM
C7. CHAPTER 7
ISSUING CLEARANCE AND GRANTING ACCESS

C7.1.1. General

......

C7.1.3.2. **In the absence of derogatory information** on the individual concerned, DoD commanders and organizational managers shall accept a personnel security clearance determination, issued by a DoD authority authorized by this Regulation **to issue personnel security clearance,** as the basis for granting access, when access is required, without requesting additional investigation or investigative files.

EXCERPT FROM
C10. CHAPTER 10
C10.1 SAFEGUARDING PERSONNEL SECURITY INVESTIGATIVE RECORDS

C10.1.1. General. In recognition of the sensitivity of personnel security reports and records, particularly with regard to individual privacy, it is Department of Defense policy that such personal information shall be handled with the highest degree of discretion. Access to such information shall be afforded only for the purpose cited herein and to persons whose official duties require such information. Personnel security investigative reports may be used only for the purposes of determining eligibility of DoD military and civilian personnel, contractor employees, and other persons affiliated with the Department of Defense, for access to classified information, assignment or retention in sensitive duties or other specifically designated duties requiring such investigation or for law enforcement and counterintelligence investigations. Other uses are subject to the specific written authorization of the Deputy Under Secretary of Defense for Policy.

C10.1.2. Responsibilities. DoD authority's responsibility for administering the DoD personnel security program and all DoD personnel authorized access to personnel security reports and records shall ensure that the use of such information is limited to that authorized by this Regulation and that such reports and records are safeguarded as prescribed herein. The Heads of DoD Components and the Deputy Under Secretary of Defense for Policy for the Office of the Secretary of Defense shall establish internal controls to ensure adequate safeguarding and limit access to and use of personnel security reports and records as required by paragraph C10.1.3. and C10.1.4., below.

EXCERPT
FROM
DOD 5200.2-R. JANUARY 1987
DEFINITIONS

DL1.1.21. Security Clearance A determination that a person is eligible under the standards of this Regulation for access to classified information.

DL1.1.22. Senior Officer of the Intelligence Community (SOIC). The DoD Senior Officers of the Intelligence Community include: the Director, National Security Agency/Central Security Service; Director, Defense Intelligence Agency; Assistant Chief of Staff for Intelligence, U.S. Army; Assistant Chief of Staff for Intelligence, U.S. Air Force; and the Director of Naval Intelligence, U.S. Navy.

DL1.1.23. Sensitive Position Any position so designated within the Department of Defense, the occupant of which could bring about, by virtue of the nature of the petition, a materially adverse effect on the national security. **All civilian positions are either critical-sensitive, noncritical-sensitive, or nonsensitive as described in paragraph C3.1.1..**

DL1.1.24. Significant Derogatory Information. Information that could, in itself, justify an unfavorable administrative action, or prompt an adjudicator to seek additional investigation or clarification.

EXCERPT FROM POSITION DESCRIPTION

Agency Position Nr. 15119

New position, HQ Washington, D.C. Arlington, VA

7. Fair Labor Standards Act: Exempt

9. Subject to IA Action: Yes

10. Position Status: Competitive

11. Position is: Managerial

12 Sensitivity: Special Sensitive

13. Competitive Level Code: 03

15b. Security Assistance Analyst, GS-1101-15, 7 Dec 95

18 Department: Department of Defense

- **a. First Subdivision: Def Sec Ast Agy (DSCA)**
- **b. Second Subdivision: Dir for Program Support**
- **C. Third Subdivision: Program Management Div**

SIGNED BY H. WAYNE WELLS 12/5/95
FOR: William L. Brandt
Chief, Management Division

....

FACTOR 9. WORK ENVIRONMENT

Work is performed in a typical office setting. Incumbent must, however, be able to travel within the United States and to foreign countries.

O3-3152

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Glenda Gail Parker v. DEPARTMENT OF DEFENSE

No. ______

Petitioner's Fed. Cir. R. 15(c) Statement Concerning Discrimination

INSTRUCTIONS: Select only one of the following statements. Do not alter or add to any of the statements.

_____ (1) No claim of discrimination by reason of race, sex, age, national origin, or handicapped condition has been or will be made in this case.

_____ (2) Any claim of discrimination by reason of race, sex, age, national origin, or handicapped condition raised before the employing agency or the Merit Systems Protection Board or arbitrator has been abandoned or will not be raised or continued in this or any other court.

_____ (3) The petition seeks review only of the Merit Systems Protection Board's or arbitrator's dismissal of the case for lack of jurisdiction or for untimeliness.

___X_ (4) The case involves an application to the Office of Personnel Management for benefits.

_____ (5) The case was transferred to this court from a district court and I continue to contest the transfer.

Also, answer the following: Have you filed a discrimination case in a United States district court concerning the same matter? _____ Yes __X___NO

In the Equal Employment Opportunity Commission? _____Yes __X___No if so, identify each case use extra sheets if needed.

3-21-2003 s/Glenda G. Parker
Date Petitioner's signature

Mail this form with the petition for review or within 14 days of the date of docketing of the petition for review to:

Clerk, United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Revised Page (Filed: April 27, 2003)

UNITED STATES OF AMERICA

COURT OF APPEALS OF THE FEDERAL CIRCUIT

CLERK OF THE COURT

GLENDA GAIL CROOK (now know as) GLENDA GAIL PARKER, Petitioner, pro se

v.

DEPARTMENT OF DEFENSE, Agency

DOCKET NUBER 03-3152 (RE: MSPB DC-0752-02-0053-I-1 and MSPB DC-0752-01-0461-I-1 Date: April 20, 2003

PETITIONER'S RESPONSE

This responds to the Department of Defense counsel's brief dated April 14, 2003, and received by the petitioner on April 16, 2003, advises the Court that the petitioner has also filed a civil action discrimination case with the United States District Court for the Eastern District of Virginia Case Number CA-03-431-A, filed April 4, 2003, and provides supporting exhibits for the petitioner's case IAW 5 U.S.C. Section 7701(c)(1)(B).

I. Response follows:

II. Statement of Facts and Course of Prior Proceedings

Regarding Counsel's exhibit A2. The Sensitivity categories in block 12 are unclear. The petitioner notes that other choices listed in block 12 are: Non-Sensitive, Noncritical Sensitive, and Critical Sensitive. Only Noncritical Sensitive and Critical Sensitive require a security clearance by DOD Instruction.

THE WHITE HOUSE
WASHINGTON

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

Subject: Return of Activated Military Members to Federal Civilian Employment

As we welcome home returning Federal civil servants who were called to active duty in the continuing Global War on Terrorism, we recognize the contributions they have made in the defense of freedom. Whether they served with the Reserve Forces or the Air and Army National Guard, each of them has my personal gratitude and the respect and admiration of a grateful Nation.

The Federal Government will continue to be the model for employer support to the Guard and Reserve. We are the guarantors of the rights of returning service members under the Uniformed Services Employment and Reemployment Rights Act, and I am personally committed to providing each of them with our full support, recognition, and assistance. Accordingly, I hereby direct you to grant Federal employees under your authority who are returning from active duty 5 days of uncharged leave from their civilian duties, consistent with the provisions of Federal law.

We also are grateful for the extra efforts of the many Federal civilian employees who, in the absence of their fellow activated workers, have contributed to the War on Terror, and I urge you to recognize these Federal employees by appropriate means.

GEORGE W. BUSH

THE WHITE HOUSE

November 14, 2003

Washington Post Ad

EXCERPT FROM EMPLOYMENT AD

TECH EXPO TOP SECRET

VA's Largest Career Fairs

For the Gov't, Defense & Intelligence Community!
Next Wed., January 14th – 10am – 4pm
Ritz Carlton Tysons Corner
1700 Tysons Blvd, McLean, VA 22102 – 703-506-4300

Immediate Interviews With: Titan Corp, Lockheed Martin Microsoft, The Boeing Co., Boeing Service Co., AT&T Gov't Solutions, BAE Systems, Computer Associates, Northrop Grumman Mission Systems, Northrop Grumman Mission Systems, MDD – Xontech, Computer Sciences Corp, General Dynamics Network Systems, Harris Corp, Houston Associates, Bradley, Raytheon, AMS, Collective Technologies, Computer & Hi-Tech Management, Concurrent Technologies Corp, Crucial Security, DigitalNet, EMC Corp, Environmental Systems Research Institute, Maden Technologies, Mantech Int'l, MilitaryHire.com, Modern Technology Solutions, DefenseJobs.com, NJVC, Open System Sciences, ORACLE, Perot Systems Gov't Services/Soza Reliable Integration Services, Severn TechSources, SM&A Spacelink Int'l, SYBASE, The Computer Merchant, The Experts, University of Phoenix, Wyle Laboratories, *and more...*

ACTIVE SECURITY CLEARANCE REQUIRED FOR ALL JOBS

JOBS in IT, Engineering, Telecom, Intelligence, Operations & more…

Washington Post Ad

DEFENSE TECHNOLOGY CAREER FAIR

Security Clearance Required!

Thursday, January 15
2-7 pm
Sheraton Premiere at Tyson's Corner
8661 Leesburg Pike, Vienna, VA

Meet face to face with companies that need you now

Come to The Washington Post career fair that's just for defense technology professionals like you. You'll leave no questions about your qualifications when you interview directly with recruiters and hiring managers from top companies and organizations in the Washington area and beyond. Participating companies seek professionals with a minimum of one full year of work experience in the defense industry, an active security clearance and usually a four-year degree. Most openings are technical in nature (e.g. Engineering, Software, IT, etc).

Jobseekers: **Register online at** **www.washingtonpost.com/careerfairs**

Professional dress and resumes recommended.

Recruiters: Take advantage of this excellent opportunity to meet hundreds of experienced, PRE-SCREENED defense technology professionals. To register your company, call Kathy Spry at 202-334-8344, or call your washingtonpostjobs representative at 202-334-4100. Hurry, Space is limited.